

page 6143

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
2 - - - - - X
3 : 99-CV-7392 ROBERT A. FALISE;
LOUIS KLEIN, (JBW)
4 JR.; FRANK MACCHIAROLA; and : CHRISTIAN E. MARKEY, JR.,
5 AS TRUSTEES, :
6 Plaintiffs, : United States Courthouse
-against- Brooklyn, New York
7 : THE AMERICAN TOBACCO COMPANY;
8 R. J. REYNOLDS TOBACCO COMPANY; : B.A.T. INDUSTRIES, PLC; BROWN &
January 16, 2001
9 WILLIAMSON TOBACCO CORPORATION; : 9:30 a.m. PHILIP MORRIS
INCORPORATED;
10 LIGGETT GROUP, INC.; and : LORILLARD TOBACCO COMPANY,
11 : Defendants.
12 - - - - - X

13 TRANSCRIPT OF CIVIL CAUSE FOR TRIAL
BEFORE THE HONORABLE JACK B. WEINSTEIN

14 UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

16 For the Plaintiffs: ORRICK HERRINGTON & SUTCLIFFE, LLP
17 666 Fifth Avenue New
York, New York 10102-0001
18 BY: JAMES LAMONT STENGEL, ESQ.
19 PETER A. BICKS, ESQ.
20 NESS, MOTLEY LOADHOLT,
21 RICHARDSON & POOLE, ESQS.
28 Bridgeside Boulevard
22 P.O. Box 1792 Mount
Pleasant, South Carolina 29465
23 BY: EDWARD J. WESTBROOK, ESQ.
24 DONALD A. MIGLIORI, ESQ.
ANNE KEARSE, ESQ.

25

page 6143

page 6144

1 FOR THE DEFENDANTS:
2 BROWN & WILLIAMSON: KIRKLAND & ELLIS, ESQS.
Citicorp Center
3 153 East 53rd Street
New York, New York 10022-4675
4 BY: DAVID BERNICK, ESQ.
5
6 Lorillard Tobacco Co. Reynolds: GREENBERG
TRAURIG, LLP
7 Met Life Building
200 Park Avenue
8 New York, New York 10166
9 BY: ALAN MANSFIELD, ESQ.

JOEL M. COHEN, ESQ.

10

11 Philip Morris: WINSTON & STRAWN, ESQS.

35 West Wacker Drive

12 Chicago, Illinois 60601-9703

13 BY: GEORGE C. LOMBARDI, ESQ.

CHARLES MOLSTER, ESQ.

14

15 Lorillard Tobacco Co.: SHOOK, HARDY & BACON, LLP
One Kansas City Place

16 1200 Main Street
Kansas City, Missouri 64105-2118
17 BY: GAY TEDDER, ESQ.
18
19 R.J. Reynolds: RIKER, DANZIG, SCHERER,

HYLAND & PERRETTI, ESQS.
20 Headquarters Plaza
One Speedwell Avenue
21 Morristown, New Jersey, 07962
22 BY: ALAN E. KRAUS, ESQ.
23
24
25 FOR THE DEFENDANTS: (Contd.)Liggett Group, Inc. KASOWITZ,
BENSON, TORRES
page 6144
page 6145
1 Brook Group Ltd: & FRIEDMAN, LLP
1301 Avenue of the Americas
2 New York, N.Y. 10019
3 BY: LEONARD A. FEIWUS, ESQ.
4 R.J. REYNOLDS: WOMBLE CARLYLE SANDRIDGE & RICE
5 200 West Second Street
Post Office Drawer 84
6 Winston-Salem, North Carolina 27102
7 BY: THOMAS D. SCHROEDER, ESQ.
8
9
10
11
12
13
14
15
16
17
18
19
20 Court Reporter: Henry R. Shapiro, OCR
21 225 Cadman Plaza East
Brooklyn, New York
22
23 Proceedings recorded by mechanical stenography.
24 Transcript produced by CAT.
25
page 6145
page 6146
1 THE COURT: We're waiting for a sentence. We might
2 as well do some work here. Court Exhibit 69, Court 70, Court
3 72, Court 75 and Court 80. All have been entered by the
4 reporter. I have them all admitted. I have a motion from
5 Lorillard to strike, or in the alternative a limiting
6 instruction.
7 MR. MANSFIELD: You resolved that motion yesterday.
8 It's date stamped today. I have a notice of motion to strike
9 Court Exhibit 97, Liggett moving for an order striking three
10 exhibits. Leonard Feiwus for Liggett. These are the three
11 exhibits.
12 One of them, 911 the plaintiffs have agreed to
13 redact. They predate any alleged involvement by Liggett in
14 any wrongdoing. Your Honor has previously given the
15 instruction that advertisements that predate any alleged
16 wrongdoing by the defendant do not -- cannot be the basis for

17 any substantive liability.
18 Your Honor has ruled that they could come in as
19 evidence but with that limiting instruction, we'd ask for the
20 same instruction.

21 THE COURT: Any objection?

22 MR. WESTBROOK: Those are responsive to professor
23 Martin.

24 THE COURT: I'll give the instruction when the jury
25 comes in. 76050.924, 76050.911, 76050.4671 are all admitted,
page 6146

page 6147

1 only for the purpose of showing action before any wrongdoing
2 is charged. Wrongdoing is claimed.

3 MR. FEIWUS: And cannot be the basis for any
4 substantive liability.

5 THE COURT: And cannot be the basis for substantive
6 liability. The documents may support an inference of
7 continuing conduct.

8 MR. FEIWUS: Thank you, your Honor.

9 We'd like to remind the Court at the close of the
10 joint defendants' case we have three exhibits that we'd like
11 to move into evidence and publish to the jury.

12 THE COURT: When it's appropriate, take action.

13 MR. FEIWUS: Thank you, your Honor.

14 THE COURT: You want to publish these to the jury?

15 MR. FEIWUS: Those aren't the three that I want to
16 publish.

17 THE COURT: The motion to strike Court Exhibit 97 is
18 granted and denied in part.

19 I have a motion, I think we spoke about it yesterday,
20 defendant's motion to exclude from evidence the Federal Trade
21 Commission staff report on the cigarette advertising
22 investigation which is Court Exhibit 98.

23 Anybody wish to address this further?

24 MR. WESTBROOK: By way of background we were
25 discussing a number of government reports that Mr. Bernick

page 6147

page 6148

1 wanted to put in. Mr. Bernick over the evening, at least as
2 to one of them and probably the others, selected portions.
3 This motion deals with the document that we want to put in,
4 another government report, so Bicks will address that.

5 MR. BICKS: If I may, let me give you the redacted
6 portions that we want to introduce. Plaintiff's Exhibit
7 50220.

8 This is a 1982 government report on the question of
9 consumer awareness and we redacted it to take out any issues
10 that does not relate to the key issue in the case, which is
11 consumer awareness.

12 So your Honor knows this was a document that was
13 disclosed in connection with Professor Hanson's terms, a
14 portion of the document was used in cross-examination of
15 Professor Viscusi, now in connection with the clean up of our
16 case and the rebuttal portion, in light of some of the things
17 that were said by Professor Martin, relating to the polls that
18 are discussed in there, some of the Ropper and Gallop polls,
19 we'd like to move the portions that deal with consumer
20 awareness to evidence.

21 I read the three arguments that the defendants made.
22 They say this is not trustworthy. I would like alert the
23 Court to the fact that the surgeon general in its 2,000 report
24 actually cites this document. This is the May 1981 FTC stat
25 report that is now before the Court.

page 6148

page 6149

1 The notion that this staff report is done by
2 individuals who have expertise in the area of advertising and
3 so forth is untrustworthy in light of the fact that the 2,000
4 surgeon general's report cites it. I don't believe is a well
5 founded argument.

6 The second argument that it has limited relevance to
7 the case. As your Honor knows we just put in the jury
8 instruction yesterday, a common knowledge defense for the
9 defendants, and obviously the critical issue in the case is
10 this question of knowledge, and as the Court knows the
11 defendants have called numerous experts who have discussed the
12 polls that are again discussed in this FDC report.

13 The notion that this is not relevant, I don't think
14 is well founded and the motion, there is unfair prejudice I
15 also don't think is founded -- well founded.

16 Again, this FTC report and the FTC actions, the
17 defendants have addressed this issue in their case. This FTC
18 report dealt with a number of things.

19 One of the things it dealt with was warning labels
20 and their efficacy. We're not using that portion of the report
21 and the defendants have attempted to discount the weight of
22 this report by pointing out that the recommendation in here,
23 which relates to warnings, again which are redacted and not
24 part of what we seek to use, was not accepted by the
25 government, and again, Professor Viscusi and I think Martin as

page 6149

page 6150

1 well attacked the polling data that is used and discussed in
2 this report, the Ropper and the Gallop poll and we think in
3 light of the fact that we have redacted it, that it deals with
4 a central issue.

5 I have offered to the defendants the opportunity to
6 put in any portion of the report that they would like to put
7 in and I have also made sure that there wasn't -- I made
8 effort to redact anything that related to acute smoking, if
9 there is a sentence I missed I will make sure that the
10 defendants -- we sit down and take that out.

11 I made an effort to make sure there was not anything
12 in there on youth marketing and that caveat, obviously if
13 there is a sentence that they would like out I'm perfectly
14 willing to work with them and do that, but this is a --
15 probably a four hundred page report and we have redacted it,
16 taken out any issue that does not deal with the key issue in
17 this case.

18 MR. BERNICK: That is a very disingenuous argument.
19 It usurps the jury in this case. It deals with the question
20 whether there had been adequate information that has gone to
21 the consumer. That's the problem. It's a Rule 403 problem.

22 Number two, this is the staff report that was issued.
23 If you go through our brief we quote it. The thing is arrive
24 with discussion has the word gotten out, are consumers aware,
25 what is their level of awareness. It's like introducing a

page 6150

page 6151

1 whole new expert on the stand through this document.

2 It's an assessment that is done for statutory
3 purposes that the jury won't understand. What is the statutory
4 purpose? This is the staff report that lead to the warnings.
5 What they did was dip in the stream of what Congress would
6 determine, what warning would be issued and they plunged out
7 the staff record, which became the predicate for the

8 warnings.

9 What the FTC did, we have to look at the adequacy of
10 the warns and discharged our statutory authority. We must find
11 that consumers must be misled. That is what triggers their
12 statutory active to make a decision. It's not pursuant to
13 statutory authority and not through a statutory agency --

14 THE COURT: When was the report actually written?

15 MR. BICKS: 1981.

16 MR. BERNICK: The rotational warnings were taken up
17 in 1981 and 1982.

18 THE COURT: It's marked in the library of FTC of
19 1982.

20 MR. BICKS: That is when it was filed with the
21 library.

22 THE COURT: Yes, May 1981.

23 MR. BICKS: We know that from the 2,000 surgeon
24 general's report that cites it as an authoritative report.

25 MR. BERNICK: The first pages recite what their

page 6151

page 6152

1 acting pursuant to, their statutory authority to make
2 recommendation, pursuant to the powers that are conferred on
3 them through section 5 of the FTC Act, which deals with the
4 question of misleading information.

5 It says whether the failure to warn, page 1, line 5,
6 whether the failure to warn constitutes an unfair or deceptive
7 act or practice within the meaning of section 5 of the FTC
8 Act. It's pursuant to their authority under section 5 that
9 they're going ahead and making all of these findings, which
10 then became a predicate for changing the warning system.

11 They're taking a government agency with authority to
12 act under section 5, the government agency does that pursuant
13 to their authority, they make recommendations, that than
14 prompts the rotational warning system.

15 This jury considering the issue where there has been
16 some kind of deception sees an FTC staff report that says
17 there is deception, and yet the FTC is doing it for a
18 statutory purpose. Basically, you now have an agency acting
19 under their authority replacing the province of the jury.

20 This is exactly why -- this is the same issue that
21 had in the breast implant litigation in connection with the
22 FTC issues there. They don't come before the jury because
23 they're so confusing and so prejudicial.

24 That is number one. They never offered this through
25 a witness at all. It was not subject to cross-examination

page 6152

page 6153

1 concerning this report in terms of the substance of the
2 report. They're now coming in in rebuttal and saying you
3 listened to this evidence for two months and now we'll give
4 you a staff report, which tells you what you should do.

5 Number 3, this same process led to the process not to
6 adopt the synergy warning. This was the same process. We
7 don't want to do a synergy warning, we're not being permitted
8 to get into that, their permitted to get into it for this
9 purpose. You obviously have a hearsay problem that has to
10 be -- cannot be addressed.

11 We cannot cross-examine a witness who is relying upon
12 this. We don't have any ability to do it. This is the
13 functional equivalent of telling the jury, here is a roadmap
14 how you should decide the case.

15 Now, if they want to use polling information, which
16 was the -- as I said, the argument was so disingenuous. He

17 talks like it was all about polling information.

18 They have all kinds of witnesses who dealt with the
19 polls. There is a summary table that deals with polls. If
20 they want to offer in the summary table that deals with polls
21 we don't have an objection. What we have is an objection to
22 the analysis and all the action of the FTC acting pursuant to
23 its authority.

24 I don't see anything that more squarely invades the
25 province of the jury, telling them, hey an agent looked at
page 6153

page 6154

1 deceptive practices.

2 THE COURT: I think I'll have to go through the
3 document. It falls just short of being an ancient document.

4 MR. BICKS: That is correct. The statutory authority
5 that Mr. Bernick points to is the basis for the government
6 report exception to the hearsay rule, something done pursuant
7 to authority.

8 We're not putting in any statement in here about any
9 advertising is misleading or anything like that. We've taken
10 that out. All we're doing is putting in the analysis done to
11 government authority as to the polling data that has been
12 discussed before the jury.

13 A portion of this did get admitted through Professor
14 Viscusi, but it was a paragraph of the report, and then there
15 was redirect to point out exactly what Mr. Bernick says, that
16 undercuts the weight of anything that the FTC did, because
17 Congress did not adopt the recommendation that was made in a
18 portion of this that we're dealing with, which is warnings
19 issues.

20 This has been a document that has been discussed
21 before the jury and now in connection with the rebuttal case,
22 we're seeking to put in the additional aspect that again deal
23 with issues that have been discussed in cross-examination.

24 MR. BERNICK: The part we sought to exclude --

25 THE COURT: I will go through it. You both have the
page 6154

page 6155

1 document before you.

2 MR. BERNICK: While we're up here, we have an
3 additional, I think this is maybe the final list that we'll be
4 offering of exhibits. I don't believe there is any objection
5 to them.

6 (Shown to court.)

7 THE COURT: This is Court Exhibit 100. These are
8 going to be introduced today.

9 MR. BERNICK: Yes, your Honor. There is no
10 objection.

11 THE COURT: Admitted, and one exhibit is withdrawn
12 that was already admitted.

13 MR. BERNICK: Yes, that is correct as indicated
14 there.

15 THE COURT: GK300199 is withdrawn.

16 The court reporter will take Court Exhibit 100 and
17 enter it into the record at this point, all of those numbers.

18 MR. WESTBROOK: There is an exhibit on there,
19 GK300144 that we did notify the defendants that we objected
20 to. I thought it was being withdrawn.

21 MR. BERNICK: This was not.

22 THE COURT: Let me see it.

23 MR. WESTBROOK: This is a statement by the company
24 made to the Federal Trade Commission.

25 MR. BERNICK: They have now, you will see in the

page 6155

page 6156

1 rebuttal documents, they still continue to take issue how the
2 tar and nicotine levels were set, as if it was deception on
3 your part. We told the FTC their procedure was not a reliable
4 procedure. This is an ancient document. It was given to the
5 FTC before they adopted it and they decided to go forward.

6 MR. WESTBROOK: This was covered by Dr. Townsend.

7 THE COURT: I will admit it. The reporter will enter
8 all the exhibits except for the bottom one.

9 Defendant's Exhibits.

10 DX-Austern-02

11 DX-Harris-13B

12 DX-Appleton-07

13 DX-Appleton-11 ARF-000151

14 ARF-001470

15 Gi-300082

16 GJ-000106

17 GJ-000107

18 GK-300144

19 GZ-200345

20 GZ-200345

21 GZ200404

22 GZ-200673

23 GZ-200996

24 GZ-201200

25 GZ-201202

page 6156

page 6157

1 SA-300214

2 TG-000015

3 WZ-000589

4 DEM-012150

5 DEM-007140

6 DEM-007142

7 DEM-001456

8 DEM-012071.

9 MR. BERNICK: One matter of consequence on the
10 damages. I now have a letter relating to damages and it
11 pertains to the process here this morning, if your Honor wants
12 to take it up now, the question of who is going to testify
13 about damages and what we're going to do about it, or if you
14 wanted to continue to talk about the documents.

15 THE COURT: We'll adjourn the trial for just a moment
16 while I take up a sentence. It's my intention to go over
17 Court Exhibit 999 and allow a good deal of it, but exclude
18 material. If you want to hold it and try to reach an
19 agreement, fine. There is still some reference to juveniles,
20 certainly all the polling information directly and indirectly
21 should come in. If you want to work it out fine, otherwise
22 I'll take care of it.

23 (Recess taken.)

24 (Trial continued.)

25 THE COURT: Bring in the jury.

page 6157

page 6158

1 (Jury present.)

2 THE COURT: Good morning, everybody. We're
3 approaching the end of the testimony. We hope that sometime
4 by early afternoon you will have heard all the testimony.
5 We've been working on documents, some of which you have seen,
6 some of which you haven't seen, which were admitted. Some in
7 your presence and some out of your presence and there will be

8 more. I have on my desk 76050.911. Chesterfield. L&M
9 76050.924. L&M and this other Chesterfield. I think you have
10 seen these in one form or another. Something similar.
11 76050.4671.

12 They're admitted only for the purpose of showing
13 action before any wrongdoing is claimed. They're earlier,
14 1950 or earlier and they cannot be the basis for liability.
15 But the documents may support an inference of continuing
16 conduct, that is they continue to do that after the charge
17 that they began to violate the law, which is involved in this
18 case, is that clear?

19 MR. FEIWUS: The point is specifically with respect
20 to Liggett.

21 THE COURT: These are Liggett documents.

22 Do you want to take them please. I also want to take
23 up a matter that occurred at the end of the last session. Last
24 Friday you remember I asked some questions of Dr. Mendelsohn
25 about one of the trust claims files she was working on. I

page 6158

page 6159

1 didn't mean to suggest that the adequacy of the medical
2 information in the trust claims files is not relevant to the
3 trust claims seeking recovery from the defendants. That is
4 the adequacy of the claims is for you to decide based upon the
5 evidence, because based on those claims and payments made on
6 the claimant, the trust is asking you to make award against
7 the tobacco company.

8 What the doctor testified to was relevant.

9 Anything further before we begin this morning's
10 activities?

11 MR. BERNICK: Nothing, your Honor.

12 MR. WESTBROOK: No, your Honor.

13 THE COURT: Now, with respect to the rest of this,
14 just so that you can have in mind where we think the case is
15 going, if we finish the testimony today, we will be meeting
16 this afternoon as we met yesterday to tie-up a lot of loose
17 ends, the charge and list of exhibits, all of which is fairly
18 complicated, as you can appreciate, we want to simplify as
19 much as we can the list of exhibits that go into the jury room
20 so you'll be able to deal with them in an very systematic
21 way.

22 If we accomplished that by the end of the day, then I
23 would like you to come in tomorrow, Wednesday at 9 a.m. The
24 reason for that is that if you come in at 9:00 a.m., we think
25 that the plaintiff can reduce its summation, it's a very

page 6159

page 6160

1 complex summation, they're try to reduce it to about three
2 hours, the defendants will do the same thing, than there will
3 be a rebuttal, that will be their part of it, and then
4 Thursday you have a medical appointment, right, so you cannot
5 be in, we cannot proceed on Thursday.

6 Then Friday I will probably want you to come in again
7 at 9:00 a.m., and I will have a rather lengthy charge, you
8 will have copies, and we'll go over it. You'll be able to
9 deal with the case readily.

10 You are a very good jury and I watched you. We want
11 to try to get it prepared so that it's as easy as possible for
12 you to proceed. That will mean Friday morning I will charge
13 you, it's an extensive charge, it will take a couple of hours,
14 you will have a list of questions and things, and you'll begin
15 your deliberation on Friday. That's the way it shapes up.

16 I would like you to be able to arrange, if you can to

17 come in nine o'clock tomorrow and nine o'clock Friday, if it's
18 not too inconvenient, we'll serve lunch both those days as
19 well as today.

20 Okay. Proceed.

21 MR. BERNICK: We're ready to proceed.

22 THE COURT: Yes, go ahead.

23 MR. BERNICK: We'll now play the video deposition of
24 Marianna Smith. Marianna Smith used to be the executive
25 director of the Mansville Trust, when first formed.

page 6160

page 6161

1 THE COURT: Court Exhibit 101 is the charge with
2 respect to Dr. Mendelsohn.

3 (Tape played.)

4 Is there much more of this?

5 MR. BERNICK: I think that concludes the video. We
6 have some portions that we'd like to read.

7 THE COURT: Then let's take a break.

8 (Recess taken.)

9 (Followed on next page.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

page 6161

page 6162

1 (Case on trial resumed.)

2 (Jury not present.)

3 MR. BERNICK: As a matter of logistics, I think
4 probably between the next video and the couple of things that
5 will be read, we will be out of evidence by noon or shortly
6 before noon. There are, however, some details and what might
7 be appropriate is to then break and we can come back.

8 THE COURT: I will see if I can get their lunch
9 around noon.

10 (Jury now present.)

11 THE COURT: Yes, proceed please.

12 MR. BERNICK: Good morning, ladies and gentlemen.
13 Just a couple of things that dropped out of the videotape.
14 Marianna Smith (reading):

15 Let's talk about a few more.

16 "Question: Did you have any contacts with the Tobacco
17 industry back in this period of time that you were an
18 executive director of the Trust?

19 "Answer: No I don't think so.

20 "Question: Are you aware of any context that took
21 place between anybody representing or affiliated with the
22 Tobacco industry on the one hand and anybody at the Trust on
23 the other hand?

24 "Answer: Not that I know.

25 "Question: Are you aware of any representations of

page 6162

page 6163

1 any kind that were played to the Trust by the Tobacco industry
2 directly OR indirectly.

3 "Answer: No, I am not.

4 "Question: Are you aware of any activities of the
5 Tobacco industry that affected Trust operations back during
6 the period of time that you were an executive administrative
7 director of the Trust?

8 "Answer: No, I don't know of any impact they had on
9 us at the time that I have knowledge of."

10 Then we have a videotape for another Smith -- Greg
11 Smith that lasts I think about 15 -- 17 minutes. Mr. Smith
12 used to be a claims resolution person for the Trust. If we
13 could get the light, Your Honor. I am sorry.

14 (Mr. Bernick reading)

15 "Question: State please take your full name for the
16 record.

17 "Answer: Lelan Gregory Smith.

18 "Question: I'd like to go back in time to when you
19 began working with the asbestos claims facility. Could you
20 please describe what that asbestos claims facility is?

21 "Answer: Well, what it was in those days, it was a
22 group of 30-odd manufacturer and a number of insurance
23 companies who had pooled resources to handle asbestos
24 litigation nationwide.

25 "Question: What was their purpose and what was the

page 6163

page 6164

1 their modus of handling the cases -- the asbestos cases?

2 "Answer: By and large the cases were evaluated on an
3 individual basis and attempts were made to settle them. If
4 they didn't settle they went to trial.

5 "Question: What was your job specifically with the
6 asbestos claim facility?

7 "Answer: When I first went there in 1986 I was a
8 senior analyst and sometime thereafter I -- probably a year
9 later I became a claim supervisor.

10 "Question: What was specifically your job when you
11 were senior claim analyst in 1986 for the Asbestos Claim
12 Facility?

13 "Answer: I evaluated an attempted to settle asbestos
14 claim.

15 "Question: When you attempted to settle claims were
16 you attempting to settle the claim for the participants in the
17 Asbestos Claim Facility?

18 "Answer: That's correct, yes.

19 "Question: How many other people were handling the
20 claims in 1986?

21 "Answer: At the facility or -- so we are clear on
22 the time period, before I actually went to Princeton to work
23 or after I was there?

24 "Question: After you were there.

25 "Answer: Oh, I suppose there were on the order of 30

page 6164

page 6165

1 people who do what I did in some fashion or other.

2 "Question: When you say 30 other people, were you
3 doing what you did, meanwhile you were a senior claim analyst?

4 "Answer: Basically, yes. There were other -- a
5 couple of other senior analysts. Most of the of the people
6 there were analysts. As I recall, there were three claim
7 supervisors and a claim manager.

8 "Question: What were your responsibilities as claim
9 supervisor?
10 "Answer: I had over approximately four or five of
11 the claim analysts, and I had responsibility for a particular
12 region and which sort of loosely defined what would have been
13 the Midwest. Also, I had responsibility for all of the FELA
14 cases nationwide.
15 "Question: Did you settle claim yourself while you
16 were the claim supervisor?
17 "Answer: Yes.
18 "Question: Did you settle claim yourself while you
19 were the claims supervisor.
20 "Answer: Yes.
21 "Question: For ACF?
22 "Answer: Yes, frequently.
23 "Question: How did the asbestos claims facility
24 settle cases?
25 "Answer: I'm not sure I understand your question.

page 6165

page 6166

1 "Question: How did the Asbestos Claim Facility handle
2 the claim in order to reach a settlement?
3 "Answer: Well, we would have a liaison counsel in
4 various jurisdictions. They would conduct discovery on each
5 of the cases individually, for the most part, or in certain
6 jurisdictions courts where -- Ohio comes to mind, they handled
7 huge numbers of claims at the same time. They would conduct
8 discovery and provide us with the information from discovery.
9 We would undertake to evaluate and negotiate the cases.
10 "Question: Did you use any forms to evaluate the
11 claims while you were with the Asbestos Claim Facility?
12 "Answer: Yes, we had forms.
13 "Question: Was there a name for the form -- for just
14 an evaluation form?
15 "Answer: It was probably something like a case and
16 analysis form or something on that order.
17 "Question: Would that be similar to what eventually
18 the Trust would be using as a case analysis summary?
19 "Answer: Yes.
20 "Question: When you settled -- strike that. When you
21 handle the claims for the Asbestos Claims Facilities what
22 information did you look for in order for you to arrive at the
23 a value for a claim?
24 "Answer: Well, we would look for medical reports.
25 We would determine if the individual had a smoking history and

page 6166

page 6167

1 what that smoking history might be. On indication or
2 depending and how close to trial you were, sometimes you had
3 expert reports both from the plaintiff's side and the defense
4 side, the typical sort of information that you would use to
5 evaluate any kind a claim.
6 "Question: Did you look for exposure information,
7 exposure to asbestos?
8 "Answer: Of course.
9 "Question: You testified before that you looked at
10 the smoking history of I guess they would be plaintiffs who
11 had made claims against the Asbestos Claim Facility. Was the
12 purpose of looking at the smoking history to take something --
13 to take a smoking discount for the people who were smokers?
14 "Answer: Yes.
15 "Question: Describe what a smoking discount is?
16 "Answer: Well, I think different people arrive at

17 that in a different fashion but certainly I will look at how
18 many years they smoked, how many -- how many packs per day
19 they smoked, how long they had been smoking, whether or not
20 they had quit smoking and how long before that point in time
21 they ceased smoking. If I didn't mention what kind of
22 cigarettes they smoked, whether they would be filtered or
23 unfiltered cigarettes. Those sorts of factors.

24 "Question: Why did you look at those factors that you
25 just mentioned when determining what the smoking discount

page 6167

page 6168

1 should be?

2 "Answer: Because it's at least in my experience in
3 asbestos litigation it's long been known that cigarette
4 smoking can damage your lungs and that cigarette smoking can
5 contribute to the development of lung cancer and I think
6 that's been common knowledge since back in the 60s when the
7 surgeon general put the warnings on the packages.

8 "Question: My question is more -- actually a little
9 more specific. Why did you look at the specific factors that
10 you talked when determining what the smoking discount should
11 be. For example, when you said whether the cigarette was
12 filtered or unfiltered?

13 "Answer: I have a simplistic basis. That's what I
14 have been trained to do.

15 "Question: Why do you believe you have been trained
16 to look at those factors.

17 "Answer: For the reasons just stated, because those
18 were important factors in determining possible causation of
19 various lung disease.

20 "Question: Would the same apply to all the other
21 factors that you described before, that each of the factors
22 might have an impact on your evaluation as to what the smoking
23 discount should be for that individual?

24 "Answer: Well, it might or might.

25 Claims evaluation is not an exact science by any

page 6168

page 6169

1 stretch of the imagination. Personally what I have tried to
2 do is learn as much as I possibly could about a given
3 plaintiff.

4 I don't believe, as I sit here today, that I've ever
5 taken one factor and said, oh, yes, this person's claim is
6 worth zero because of this one particular factor. I tried to
7 get a total picture of that person.

8 "Question: That's a good point. I think we are --
9 I'm trying to reach that point as well, which is simply you
10 look at all the factors that you can gather that you have
11 enumerated. Each of those factors would be helpful for you in
12 evaluating a claim?

13 "Answer: That's correct, yes.

14 "Question: While you were with the asbestos Claim
15 Facility did you take a smoking discount for lung cancer?

16 "Answer: Yes.

17 "Question: What was the range of the smoking discount
18 for lung cancer while you were at amount of the ACF. By the
19 way when I use the term ACF I mean the Asbestos Claim
20 Facility.

21 "Answer: I understand. I suppose it could have been
22 as much as 50 percent and as little at five percent. A fairly
23 broad range.

24 "Question: If a person was a current smoker and had
25 lung cancer would you take a smoking discount for that person?

page 6169

page 6170

1 "Answer: Yes.

2 "Question: Did you take smoking discounts for a
3 person who alleged a pleural disease, and also, was alleging
4 fear of cancer?

5 "Answer: Probably, but not because the smoking had
6 anything to do with the pleural disease.

7 "Question: Is it your opinion that pleural does not
8 have anything to do with smoking?

9 "Answer: I've never seen any definitive studies that
10 would indicate that.

11 "Question: Then I assume that the reason you would
12 take the smoking discount is if the person is alleging fear of
13 cancer, and presumably that would include lung cancer, if the
14 person is smoking, part of the fear of cancer you would
15 attribute to smoking?

16 "Answer: I would think so, yes.

17 "Question: Has there ever been any definitive study
18 to your knowledge that smoking increases the prevalence of
19 asbestosis?

20 "Answer: Not that I've ever seen.

21 "Question: In what year did you leave the Asbestos
22 Claim Facility?

23 "Answer: 1988.

24 "Question: You mentioned before that you began
25 working for the Trust in March of 1988?

page 6170

page 6171

1 "Answer: That's correct.

2 "Question: What was your title when you began working
3 for the Trust in March of 1988?

4 "Answer: I was the manager of the western region.

5 "Question: To whom did you report while you were at
6 the Trust as manager of the western division?

7 "Answer: Initially reported to Paul Loehr and then
8 after a time Dan Thurston came on board as director of
9 claims. He would have been in a position between Mr. Feeley's
10 position and my position and Mr. Loehrer's position. I believe
11 he was director of claim at that time.

12 "Question: Did you have any other informal reporting
13 at the Trust? In other words, did you report uniformly to
14 anybody else at the Trust besides the formal report to
15 Mr. Loehrer?

16 "Answer: Oh, I think -- well, there were lots of
17 reports again, generated, computer reports, how many cases
18 were settled, what they settled for. I assume that everyone
19 in the Trust had access to those questions.

20 "Question: I'm sorry. When I said report, I didn't
21 mean a written report. I meant to whom did you report, or did
22 you report to anybody else uniformly while you were at the
23 Trust? In other words, did you have to report to Marianna
24 Smith about what you were doing as the manager of the western
25 region?

page 6171

page 6172

1 "Answer: Oh, sure. I mean she was everyone's
2 superior at that point in time. She was the executive
3 director and if there was something she wanted to know about,
4 it was up to me to tell her. It would have been my
5 responsibility.

6 "Question: Another thing I could have meant was did
7 she get reports from you, either uniformly or through written

8 about the status of the settlement of cases?
9 "Answer: Oh, sure.
10 "Question: Were there other people who would be
11 receiving those types of informal reports about the settlement
12 of cases?
13 "Answer: I would have to assume they eventually
14 wound up in the financial department. I would have to assume
15 that David us stern saw them can you did he personally settle
16 5,000 pre C claim and review the settlement of approximately
17 8,000 more?
18 "Answer: Yes were the pre-C claims settled in
19 groups?
20 "Answer: For the most part, yes.
21 "Question: Can you give us a percent on what the most
22 part is for the pre-C claim?
23 "Answer: Oh, it would have been somewhere in the 90
24 percent. Every now and again there were would be a claim or
25 number of claims for a particular group for whatever reason

page 6172

page 6173

1 had to be treated and somewhat differently, mostly because we
2 would be worlds apart in trying to settle that particular
3 case. So they would be taken out and given a closer look.
4 "Question: To term what the codefendants were paying
5 for the claimants at issue, did you rely on the ACF data?
6 "Answer: To a degree, yes.
7 "Question: Did you Trust the ACF data for determining
8 what the appropriate amount should be paid by the members of
9 the ACF?
10 "Answer: Yes.
11 "Question: Why did you Trust the ACF data?
12 "Answer: Well, because that historically I think was
13 the way that claims were evaluated. It was the way I've been
14 trained to evaluate them even when I worked for Pittsburgh
15 Corning. So I was comfortable with the process and assumed
16 that the process worked.
17 "Question: It was more than just an assumption; you
18 yourself were personally involved in the process as well for
19 the ACF?
20 "Answer: Sure.
21 "Question: Would you agree with me that by using the
22 ACF data to determine the appropriate amount of payment to the
23 claimants, that implicitly smoking discount was taken because
24 the ACF had taken a smoking discount?
25 "Answer: If you're working for the same bottom line

page 6173

page 6174

1 and, in fact, a smoking discount had been taken, it would have
2 been taken into account, yes.
3 "Question: Now, you mentioned before that there were
4 occasions during the Pre-C -- for the Pre-C claim that you did
5 individually evaluate the claims; is that right?
6 "Answer: Yes.
7 "Question: For those claims did you take a smoking
8 discount if the person was a smoker?
9 "Answer: Yes.
10 "Question: And did you apply the same criteria that
11 you had used while at ACF?
12 "Answer: Yes.
13 "Question: When you were working for the Trust and
14 settling post C claims, did you take a smoking discount for
15 those people who were smokers?
16 "Answer: Keeping in mind that during that particular

17 time I personally did not do a lot of the evaluations and
18 settlement of the claims. The claims staff were instructed to
19 do so, yes.

20 "Question: Would you agree with me that the smoking
21 discount should be taken considering its effect on the claim's
22 disability?

23 "Answer: Yes.

24 "Question: More specifically, was a smoking discount
25 based on the impact of the smoking on the claimant's

page 6174

page 6175

1 condition.

2 "Answer: Yes.

3 "Question: We talked earlier about the CAS case
4 analysis form which would be a case analysis summary; is that
5 correct?

6 "Answer: Yes.

7 "Question: In a case analysis summary there would be
8 deductions taken for certain discounts; is that correct.

9 "Answer: Yes.

10 "Question: One deduction that was on the Case
11 Analysis Summary form was a shared causation discount?

12 "Answer: That's correct.

13 "Question: Would you agree with me that the shared
14 causation discount almost always refers to the smoking
15 discount?

16 "Answer: Frequently it would have been.

17 "Question: Did the Trust have another discount called
18 other discounts?

19 "Answer: Yes.

20 "Question: Would the other discounts be used for
21 other possible exposures that weren't smoking?

22 "Answer: Other discounts might have been factors not
23 associated with the causation but factors which might affect
24 the value in other cases. For example, if you had somebody
25 who allegedly had a very serious asbestosis and yet, you knew

page 6175

page 6176

1 that the person was running six miles a day, something like
2 that, that might come under other factors.

3 "Question: To refresh your recollection, would
4 exposure to PCVA be taken as another discount as opposed to a
5 shared causation discount?

6 "Answer: It might.

7 "Question: Would you agree with me that PCVA would be
8 a causation issue?

9 "Answer: Yes, but it depends sometimes on the kind
10 of weight that a person wanted to give that causation.
11 Probably something that is easier to discount than other
12 factors.

13 "Question: On Exhibit 68 do you see the paragraph
14 which begins: Next comes several deductions?

15 "Answer: Umm-humm the sentence reads: Shared
16 causation almost always refers to the smoking discount?

17 "Answer: Yes.

18 "Question: Was that how you trained your evaluators
19 shared causation cases would almost all refer to the discount?

20 "Answer: Certainly.

21 "Question: What was the Cimmino group settlement.

22 "Answer: What we call the Texas class action.

23 "Question: How many claims were settled as part of
24 the Texas class action settlement?

25 "Answer: Oh, I don't know exactly how many there

page 6176

page 6177

1 were right now. Something in excess of 3,000 or so.
2 "Question: Did you individually evaluate each of the
3 -- strike that. Did the Trust individually evaluate each of
4 the Cimmino claimants or Texas class action claimants?
5 "Answer: I think that it -- eventually most of those
6 cases were reviewed individually.
7 "Question: Was a smoking discount taken for those
8 people who were smokers and for whom a smoking discount was
9 appropriate in the evaluation of a claim?
10 "Answer: In the evaluation process I would say that
11 it was, yes.
12 "Question: Who actually settled the Cimmino or Texas
13 class action on this?
14 "Answer: Marianna Smith.
15 "Question: Was the information regarding the
16 individual evaluation of each of the claims provided to
17 Marianne Smith?
18 "Answer: Not that I recall, no.
19 "Question: Was there a number that the people who had
20 done the individual evaluations thought would be appropriate
21 for the settlement of the Cimmino Texas class action?
22 "Answer: There was a number, yes.
23 "Question: Was that number provided to
24 Marianna Smith?
25 "Answer: Yes.

page 6177

page 6178

1 "Question: Did Marriana Smith settle the Texas class
2 action at the number provided by the people who did the
3 individual evaluations?
4 "Answer: No.
5 "Question: Did Marianna Smith follow the
6 recommendation of the people who evaluated the Texas class
7 action?
8 "Answer: Obviously not in the sense that that wasn't
9 the number that the cases settled for but I think in the sense
10 that she listened to the recommendations. And then there may
11 have been other factors that I'm not aware of but that entered
12 into the negotiations.
13 "Question: Did Marriana Smith settle the case for
14 more than the recommended amount?
15 "Answer: Yes.
16 "Question: Yes.
17 "Question: Was it significantly more than the
18 recommended amount?
19 "Answer: Yes.
20 "Question: Do you recall how much more she settled
21 the claims for than the amount recommended by the people who
22 did the individual evaluation?
23 "Answer: Not, exactly, no.
24 "Question: Can you give me an order of magnitude?
25 "Answer: Some number of millions of dollars. I will

page 6178

page 6179

1 suggest 30, or 40.
2 "Question: Thirty or 40 million dollars more than the
3 recommended amount?
4 "Answer: Forty is probably on the high side.
5 Probably somewhere around 30, I would guess.
6 "Question: Regardless of whether it mattered, were
7 you disappointed by the amount of the settlement?

8 "Answer: I don't know that disappointed is the right
9 term.

10 "Question: What is the right term.

11 "Answer: It was different than what I had
12 recommended, although in my lifetime I've recommended a lot of
13 things that people didn't listen to, so, you know, it wasn't a
14 first for that and certainly won't be a last."

15 MR. BERNICK: With a very, very short clip from
16 Patricia Houser who became the executive director after
17 Marianna Smith. Would it be faster if I just read it?

18 I think we are done with the video material.

19 MR. STENGL: Your Honor, counsel might indicate when
20 Ms. Houser was at the Trust.

21 MR. BERNICK: Until the end of the year 1999.

22 With this supplement could we put on the Elmo please
23 (reading):

24 "Question: Ms. Houser, is it fair to say even at the
25 time the final TDP was put in place that the Trust anticipated
page 6179

page 6180

1 that there might problems with the TDP?

2 "Answer: Yes.

3 "Question: In particular is it accurate to say that
4 the Trust had been troubled by the lack of exposure
5 requirements in the TDP?

6 "Answer: Yes.

7 "Question: And this might lead to a risk of paying a
8 significant number of none-asbestos related claims?

9 "Answer: That was a concern expressed, I believe."
10 Continuing on to page 187 -- page seven.

11 "Question: In point of fact, in 1995 and 1996 the
12 Trust observed a much greater than expected filing of
13 asbestosis claims, correct?

14 "Answer: Yes, that's correct.

15 "Question: It came to the conclusion that the TDP was
16 being damaged and claims were being filed that weren't
17 entitled to compensation, correct?

18 "Answer: That was -- that was my opinion at the
19 time."

20 Then I have a very short excerpt from Mr. Austern
21 from whom the jury has heard at page 215 line 15.

22 "Question: Let me put it to you this way. Can you
23 identify for me any statement that was made by the Tobacco
24 industry, directly or indirectly, which you took to be true
25 and because you took it to be true, you relied on to the
page 6180

page 6181

1 Trust's detriment on that statement?

2 "Answer: I cannot, as I sit here, think of any
3 tobacco company statement in 1988 that I relied on as being
4 true which, because I thought it was true, stopped me from
5 suing the tobacco companies."

6 Finally, I believe the last reading we will have for
7 the jury, although I think we will rest formally after the
8 lunch break, are from requests for admission that were
9 propounded to the Trust and I think the jury is familiar with
10 what requests for these were questions that were asked
11 formerly and that the Trust responses formerly during
12 proceeding.

13 Request number 15: Request to admit.

14 Admit that with respect to any specific asbestos
15 claimant, the Trust cannot identify (A) the brand of tobacco
16 consumed by said asbestos claimant; (B) whether said claimant

17 smoked regular, light and/or ultra light cigarettes; (C)
18 whether said claimant smoked filtered or unfiltered cigarettes
19 or switched between filtered or unfiltered cigarettes; (D)
20 when said claimant smoked each type of cigarette, for how long
21 said claimant smoked each type of cigarette.

22 Request number 14: Admit that the Trust will not
23 offer proof of any representation by any defendant that is
24 false and that any specific asbestos claimant either believed
25 it to be true or relied upon it with respect to his or her

page 6181

page 6182

1 decision to smoke.

2 And again, the response is admitted 10/1/9 overruling
3 objections.

4 Request number 83. Admit that the Trust inherited
5 the liability of Manville for asbestos-related personal injury
6 claim.

7 This is admitted. There is a reference to a court
8 order.

9 Request number 84: Admit that the Trust is obliged to
10 pay Manville's share of any personal injury claim arising out
11 of a claimant's exposure to Manville asbestos.

12 Again response: Admitted.

13 Request 85: Admit that the Trust is not empowered to
14 pay anything more than Manville's liability for asbestos
15 related injuries.

16 Response: Admitted.

17 Again reference to the proceeding.

18 Request 86: Admit that with respect to all claims
19 resolved pursuant to the TDP, the Trust has not yet paid out
20 all of Manville's liability.

21 Response admitted that with respect to the claims
22 resolved pursuant to the TDP, the Trust's ten percent payments
23 to each claimant does not exhaust Manville's liability as
24 assumed by the Trust to each or any claimant.

25 Request number 38: Admit that the Trust and/or its

page 6182

page 6183

1 trustees have the power to seek changes in the TDP.

2 Response admitted.

3 Request 39: Admit that since the initiation of this
4 case neither the Trust nor its trustees requested to change
5 the TDP in light of the alleged liability of the Tobacco
6 companies for injury allegedly suffered by asbestos claimants.

7 Response: Admitted.

8 Request number 97. Admit that for the purposes of
9 this lawsuit the Trust will be content that it stands in the
10 shoes of those claimants of the Trust that also are or were
11 smokers.

12 Response: Denied.

13 Plaintiffs state that the Trust does not stand in the
14 shoes of its claimants for purposes of this lawsuit. Rather,
15 plaintiffs assert claims that belong to the Trust alone,
16 suffered as a result of the direct injury knowingly and
17 intentionally inflicted by the defendant on the Trust.

18 Request for admission 87: Admit that nothing
19 precludes claimants from suing tobacco companies for any
20 injuries that the claimants believe they have sustained as a
21 result of smoking.

22 Response: Plaintiffs admit that their assertion of
23 direct claim on behalf of the Trust against the defendants do
24 not preclude individual claimants from bringing whatever
25 individual claims they may have against the defendants.

page 6183

page 6184

1 Interrogatory -- this is another kind of question.
2 Interrogatory number 62: Has the Trust or any trust
3 ever made any warning or issue any statement regarding the
4 effect of smoking on asbestos-related illnesses? If so,
5 identify and describe with full particularity each warning,
6 such warning and statement.

7 Answer: No.

8 So that is all we have, Your Honor.

9 THE COURT: Yes.

10 MR. WESTBROOK: We have three documents to publish to
11 the jury. We will be ready to do that after.

12 THE COURT: Do it, five witness five witness lent.

13 MR. FEIWUS: Mr. Feiwus for Liggett. 13, it is a
14 February 14 letter February 14, 1963 letter on Liggett's
15 letterhead to Mr. Hoyt executive director of TIRC, the Tobacco
16 Industry Research Committee.

17 We refer to the visit which you and Dr. Little made
18 to your office on January 4 when you very kindly extended an
19 invitation to our company to become a member of the Tobacco
20 Industry Research Committee. It is our understanding that,
21 among other things, you feel that our membership in the
22 committee would be particularly appropriate at this time in
23 presenting a unified front on behalf of the tobacco industry
24 in dealing with our current problems.

25 We have given this matter most careful consideration

page 6184

page 6185

1 and while we recognize the significant service which the
2 committee in its overall activities is rendering and has
3 rendered to the entire tobacco industry, we are of the opinion
4 that our absence from the group at this specific time will not
5 be any serious handicap to the effectiveness of the
6 committee's activities.

7 Our company has followed a path independent of that
8 of the Tobacco Industry Research Committee since its formation
9 in 1954. However, the aims of all of us are the same and the
10 path that we have followed has been similar to that of the
11 committee in many respects.

12 As you are aware, we have arranged to present to the
13 United States Surgeon's General's Committee a report which
14 would reflect the result of a very large body of work done
15 over a period of years by the A. D. Little organization and by
16 our own research staff in Durham, North Carolina. Being as
17 objective as we can, we believe this contribution to the
18 problem will help the general cause and that the presentation
19 to the committee will be advantageous to the industry.

20 After carefully re-evaluating all aspects of the
21 situation as we know them, particularly those which you
22 brought to our attention, we believe that the aims of the
23 industry can best be served if at the present time Liggett and
24 Myer does not become a member of the committee. We wish to
25 emphasize how much we appreciate the invitation and say we

page 6185

page 6186

1 value highly our general relationship with the other members
2 of the industry. We will continue to give the matter our most
3 serious consideration.

4 With kindest regards, very truly yours Mr. Blount.

5 The other two are much shorter.

6 This is Liggett 10, Your Honor.

7 Well, it is a letter from the assistant surgeon

8 general for operations on the letterhead of the Department of
9 Health, Education and Welfare. It is dated July 3rd, 1963 and
10 the letter is to Dr. Ken Scherr the senior vice president,
11 Arthur D. Little, Incorporated. The consulting firm for
12 Liggett:

13 Dear, Dr. Kensler:

14 We feel that simple knowledge of the receipt of the
15 nine volumes which you submitted to us is not sufficient.
16 Please accept on behalf of Liggett and Myers Tobacco Company
17 and Arthur D. Little, Inc., our special gratitude for the
18 tremendous time, effort and expense in the production of this
19 material for our use. We are equally grateful for the most
20 excellent oral presentation made by Dr. Raymond Hayner (ph)
21 May 3rd. Again many thanks. Sincerely.

22 And finally, this is Liggett 12. This one is a
23 little hard to read. It is dated January 1964. It is from
24 the president of Liggett & Myers Mr. Tong to Dr. Luther Terry
25 Surgeon General of the United States.

page 6186

page 6187

1 In your press conference on Saturday you indicated
2 the particular public health service would increase its
3 research on problems associated with smoking. The scientific
4 personnel of Liggett & Myers tobacco company will be available
5 to confer with the appropriate scientists in your organization
6 regarding either aiding or cooperating with your research
7 effort. I am sure you know our capabilities in this area of
8 research through our extensive report to your advisory
9 committee on smoking and health.

10 That's it, Your Honor.

11 THE COURT: All right. We have admitted.

12 MR. FINK: Thank you, Your Honor.

13 THE COURT: Are you resting?

14 MR. BERNICK: Yes, subject to the matters we can take
15 up with the Court during the break.

16 THE COURT: All right. Why don't you take a break
17 now, ladies and gentlemen. I think your lunch is coming in.
18 We will try to convene again at about 1:00 if your lunch is
19 here.

20 (Jury out.)

21 MR. BERNICK: There are a number -- I know there are
22 at least some document issues we think we probably should try
23 to resolve before the jury gets back so that we don't
24 interrupt this afternoon. This afternoon the witness is going
25 to be Dr. Harris, I believe they are going to call on rebuttal

page 6187

page 6188

1 and then we have Dr. Wecker who is going to be called for
2 surrebuttal.

3 THE COURT: Well, we have a full day then pretty much.
4 All right. Well, let me check on some things. Do
5 you want to do that now or after we get back.

6 MR. BERNICK: Whatever is the Court's pleasure.

7 THE COURT: Why don't you go to lunch now and be back
8 at three quarters of an hour.

9 MR. BERNICK: That is fine.

10 THE COURT: In the interim you are going over that FTC
11 report. See if you can work that out.

12 MR. BERNICK: I think we have the redactions. We till
13 have some.

14 MR. FINK: The defendant reached a stipulation with
15 the long list of the exhibits to the charge and so instead of
16 that long appendix we do have a stipulation we can take up.

17 (Whereupon, the court recessed for lunch.)
18 (Continue on next page.)
19
20
21
22
23
24
25

page 6188

page 6189

1 A F T E R N O O N S E S S I O N.
2 THE COURT: What do you want to do now before I bring
3 the jury in?
4 MR. BERNICK: There are a few matters that pertain to
5 some exhibits.
6 MR. KRAUS: Your Honor, I move into evidence the
7 videos that were used in Professor Martin. Those are the
8 movie clips, the public service announcements and the like,
9 and I think Mr. Westbrook and I conferred and he has no
10 objection to that.
11 THE COURT: This list would be Court Exhibit 102.
12 I'm handing the court reporter 102 with the request that he
13 list at this point all the documents on that exhibit. They
14 are all admitted.
15 MR. KRAUS: I have WZ001546A. That document consists
16 of the designated portion from the deposition of Dr.
17 Nicholson. The relevant portions of it were read to the jury
18 during Mr. Viscusi and Dr. Martin's examination.
19 These are both sides designation, your Honor. Rather
20 than read it to the jury we decided to enter it into the
21 record.
22 Mr. Westbrook has no objection.
23 THE COURT: WZ001546A admitted.
24 (Marked).
25 MR. KRAUS: Thank you, your Honor.

page 6189

page 6190

1 MR. SHROEDER: I have a couple of documents. One is
2 to be admitted without being published, request to admit
3 number 75 with the response. It's simply a request to admit
4 during the bankruptcy, the antismoking group raised it at the
5 bankruptcy.
6 THE COURT: Do you want to give it a number?
7 MR. SHROEDER: GZ201246. That is admitted.
8 One other along the same line, your Honor.
9 During the bankruptcy the allocation formula known as
10 the Chase Company formulr was submitted in the bankruptcy.
11 In order to preserve the record ARF002673, I would like it
12 admitted.
13 MR. MIGLIORI: We have an objection to that
14 document. It's a 56 page document. It's an application to it
15 bankruptcy court. We've been precluded from using such
16 application.
17 MR. SHROEDER: All I have is the cover page to show
18 that it was submitted. If they want to stipulate that it was
19 part of the bankruptcy, it would be fine for us. I want to
20 preserve the record that was in fact considered and known by
21 Mansville during the bankruptcy.
22 MR. MIGLIORI: That is not a clear issue on the
23 record.
24 THE COURT: I don't understand why this is coming
25 in. Explain it to me.

page 6190

page 6191

1 MR. SHROEDER: That John Mansville, during the
2 bankruptcy, knew about how it could allocate smoking among
3 lung cancer claims and the article that is in evidence, which
4 is authored by Dr. Chase --

5 THE COURT: Is there a particular page?

6 MR. SHROEDER: That is just the cover page. The
7 attachments are the application showing the allocation of
8 formulas.

9 MR. MIGLIORI: I find it highly confusing and not
10 helpful.

11 MR. SHROEDER: If they want to stipulate it was
12 submitted. If we could have it entered into the record that
13 during the bankruptcy that formula was offered by the
14 Mansville Company that would be fine with me.

15 MR. MIGLIORI: That is not clear by the record. In
16 fact, it's not clear by that document either. We can't
17 stipulate.

18 THE COURT: Was that submitted in the bankruptcy
19 court as part of the record?

20 MR. SHROEDER: Yes.

21 THE COURT: If you don't want to stipulate I will
22 admit it.

23 MR. MIGLIORI: It's a 56 page document, your Honor.

24 THE COURT: It's stipulated or I will admit it.

25 MR. MIGLIORI: We'll try to work out the

page 6191

page 6192

1 stipulation. I think we can figure out what part we'll
2 stipulate to. It won't be a problem.

3 THE COURT: Admitted as redacted. Just bring it down
4 to a couple of pages.

5 MR. MOLSTER: Court Exhibit 88, I don't know if the
6 Court has its copy. We have reached agreement with respect to
7 several of the documents, your Honor, and we still have a
8 dispute as to three.

9 If I could, for the record. We're withdrawing the
10 first document WSO03988. We have reached an agreement with
11 WSO03939, and that will go in as redacted, your Honor.

12 THE COURT: Yes.

13 MR. MOLSTER: The same is true with respect to
14 WSO01643. We've reached an agreement, it will go in as
15 redacted.

16 WSO0620, we'll withdraw. It's already in evidence as
17 part of plaintiffs' 50314. The next document AM005041 was
18 admitted today as GK300144.

19 THE COURT: You are withdrawing this one?

20 MR. MOLSTER: Yes. The final three we do have
21 apparently objections from the defendants on the first one,
22 which is GL000028. Judge, it's a government document,
23 economic report of the president, 1987.

24 If I may pass up a copy. I have marked the pages that
25 we're interested in. Chapter 60, risk and responsibility.

page 6192

page 6193

1 The first paragraph is just a preamble. Then to page
2 185 there is a statement; Studies of Why People Start Smoking,
3 identifying the influence of parents, siblings and friends as
4 the most important causal factors. The prices of cigarettes
5 also influence whether people smoke.

6 Then a paragraph on 186 regarding the effects of
7 tobacco advertising are complex, there is little evidence that

8 advertising adds to additional smoking, and the rest of that
9 paragraph.

10 I'm not sure I understand what the objection is.

11 MS. KEARSE: Ann Kearse. Why people start smoking,
12 it's dealing with siblings and youth, and it deals with
13 foreign countries' response to the ban or not advertising
14 issues there.

15 I don't see any relevance to this report. The
16 document goes to various tort litigations, but I assume that
17 is not going to be put before the jury on those issues. There
18 was no witness to talk about the risk.

19 THE COURT: I will rule.

20 The only pages that will go in are 179, 185 and the
21 cover sheet.

22 MR. MOLSTER: 186, your Honor, the effects.

23 THE COURT: 179, the ones you have marked and 185 --

24 MR. MOLSTER: And 186.

25 THE COURT: 186 is not going in.

page 6193

page 6194

1 MR. MOLSTER: May I be heard?

2 There is little evidence that advertising results in
3 additional smoking. We have a statement by the government
4 there is little evidence that advertising results in
5 additional smoking.

6 The plaintiffs have put -- as with many products,
7 advertising mainly shifts consumers among brands. We think
8 it's important, given the fact that the manufacturer continues
9 to talk about our advertising, the fact that the government is
10 saying that -- that advertising effect shifts between brands
11 rather than people beginning to smoke as important, and it's
12 something for the jury to be made aware of.

13 THE COURT: It's too tenuous. There is not enough
14 support in the document. It's not that kind of a scientific
15 document. You could put in pages 185 and 179. That's all.

16 Thank you. Next.

17 MR. MOLSTER: The next document is GLO000081. It's
18 the report, your Honor, of Daniel Oliver, the FTC commissioner
19 in 1987. It has numerous references to advertising. If you
20 look on page 6, it states that the Federal Trade Commission
21 has extensive experience with advertising generally and
22 cigarette advertising in particular.

23 THE COURT: I don't want this. It's a prepared
24 statement before the transportation subcommittee on energy.
25 It's a political document. I don't want it. Denied.

page 6194

page 6195

1 MR. MOLSTER: The final one is 000519. It's a staff
2 report of the Federal Trade Commission. We want two
3 statements, the first one on page 20.

4 When it comes to cigarette industry in particular
5 studies find that advertising has little impact on industry
6 sales.

7 The next one, your Honor, is an appendix on page
8 seven, cigarette advertising and total consumption. Most of
9 the large number of studies of cigarette companies advertising
10 have found little or no effect in changes of total
11 advertising.

12 THE COURT: What is the plaintiffs' view?

13 MS. KEARSE: Your Honor, I think this is irrelevant.
14 The title of the document is Alcoholic Beverage Advertising
15 Marketing Practices. A sentence within the document on page
16 20 talking about advertising on industry sales, I think, is

17 not relevant to this case, alcoholic beverage advertising.
18 THE COURT: Admitted as to pages 7 and 20.
19 MR. MOLSTER: Thank you.
20 THE COURT: I'm handing the court reporter Court
21 Exhibit 88 to list the documents that have not been stricken.
22 Two of the documents have a notation in paren, at the side, to
23 be listed with the document in the record.
24 MR. MOLSTER: Thank you, your Honor.
25 THE COURT: Next.

page 6195

page 6196

1 MR. BERNICK: I think in terms of completing our
2 case, there is only one piece of one document that I want to
3 read, having looked over the lunch hour, and we wanted to make
4 an offer to put into evidence the designation, both the
5 plaintiffs' and the defendants' designations for the testimony
6 of Mr. Pritcher, who used to be the CEO of Brown & Williamson
7 and his deposition was taken pursuant to court order during
8 their case and both sides designation for Carol Thomas, whose
9 deposition was taken during the course of this case.
10 We won't seek to play those to the jury. We want
11 them in evidence so that we can argue from them in closing.
12 THE COURT: You want to play them?
13 MR. BERNICK: We do not want to play them.
14 THE COURT: They're in evidence.
15 MR. WESTBROOK: We're putting in our
16 counterdesignations as well.
17 THE COURT: That is correct.
18 MR. BERNICK: There are a number of issues concerning
19 rebuttal documents. I'm prepared to go through the ones that
20 I'm familiar with, as well
21 as --
22 THE COURT: Have you put in all the documents for the
23 defendants?
24 MR. BERNICK: I think we have put in all the
25 documents for the defendants. We'll be resting.

page 6196

page 6197

1 THE COURT: All on those documents that I handed
2 back, court exhibits with numbers on them are approved and are
3 in the record.
4 MR. BERNICK: The only document that I will read from
5 is a document that the plaintiffs wish to offer as part of
6 their rebuttal. 76196.006. I'm sure there is no objection
7 because they want to read from it as well.
8 THE COURT: It's admitted.
9 MR. BERNICK: They're still going through to figure
10 out what parts they're going to offer and we'll take a look at
11 it as they come in. That's where we are. With that I don't
12 think there is anything else, apart from rebuttal issues.
13 THE COURT: You are resting.
14 MR. BERNICK: We're resting.
15 MR. WESTBROOK: We do have rebuttal exhibits, it may
16 be efficient to go through them now.
17 First is a housekeeping matter, your Honor --
18 MR. BERNICK: We should take up the question of the
19 videos that you want to play or the deposition that you want
20 to read this afternoon. We've run into problem here with
21 regard to designations.
22 In connection with the deposition testimony of
23 Patricia Houser this morning, we had a much longer
24 presentation. We chopped it way, way back to, I think I read
25 about two or three questions.

page 6197

page 6198

1 Apparently yesterday we did not receive this letter,
2 they sent us a letter saying for purposes of completeness,
3 should defendants choose to submit their designation from the
4 Houser deposition at pages such and such we request the
5 following counters.

6 Well, we didn't do that. Indeed, we didn't play most
7 of the deposition. They still want to have the counters that
8 were counters to deposition designations that were never
9 used. We would strenuously object to this. She was their
10 witness, their employee. They had the opportunity to do this
11 at any point during the course of the trial, and they pertain
12 to matters that the Court excluded previously.

13 They want her to talk about the tobacco discount,
14 although she says they was not involved.

15 (Document shown to Court.)

16 THE COURT: What did you read, what portions?

17 MR. BERNICK: All that I read, she anticipated that
18 the TDP was going to be a gain and it was gained. Nothing to
19 do with anything else.

20 THE COURT: That's the second time that came in,
21 wasn't it?

22 MR. BERNICK: That was used in connection with the
23 cross-examination of experts. We played none of the rest of
24 Houser. If they have these designation, we have a whole pile
25 that would go along with it.

page 6198

page 6199

1 THE COURT: These are not appropriate counter
2 designations.

3 MR. BERNICK: With respect to Mr. Austern they have
4 done the same thing. They have a letter dated January 14 they
5 want to read from Austern and the part of Austern that they
6 want to read from was stricken by the Court.

7 At page 5,003 the very same thing. The self-serving,
8 long answer, they wanted to offer that now and that was
9 stricken by the Court. The whole deposition was going to be
10 used.

11 MR. FINK: The plaintiff seeks reconsideration of the
12 Court's ruling. They finished their testimony by reading a
13 quote from Mr. Austern as to what the trust learned and they
14 showed a series of requests for admission as to what the trust
15 received or relied on?

16 THE COURT: Denied. Next.

17 MR. BERNICK: The FTC staff report, we made progress
18 on the redaction side, your Honor. I think we've agreed on
19 redaction. We'd urge the Court to think about this again.
20 Here's the reason why.

21 Number one, your Honor ruled in connection with the
22 exclusion of Dr. Shefman on June -- on September 6 of the year
23 2,000, your Honor ruled as follows:

24 I will not permit what the FTC proposed to Congress
25 or what it was doing in its internal discussions or whether it

page 6199

page 6200

1 was remiss or not. The failure of the government in this
2 country to act properly -- if it didn't or didn't, I don't
3 know whether it didn't or didn't, this is out. We didn't call
4 Shefman. We were not permitted to call him to talk about the
5 FTC did --

6 THE COURT: Let me see what you cannot agree on.

7 MR. BERNICK: We have it down to the analysis of the

8 polling data, but it's written with the FTC's conclusion.
9 THE COURT: Let me see what you have.
10 This is 50220.
11 MR. BICKS: I would note for the record, I think the
12 defendant has just offered into evidence a series of reports
13 to the FTC, which is exactly what this document is.
14 MR. BERNICK: Almost all of them were excluded.
15 THE COURT: I'm crossing out the paragraph at the
16 bottom of page ten, take that out. I'm crossing out the next
17 paragraph about 54 million Americans. The chart Summary B is
18 allowed. The next page I cannot understand so there is no
19 point in putting it in.
20 MR. BICKS: Which page? That is the redacted chart,
21 your Honor, that you will see that at the top. It says
22 Medical Facts Study Tested, and then the number of total
23 population unaware, percentages of smokers unaware, percentage
24 of adults unaware, and then percentage of smokers unaware, and
25 the top is addiction on the bottom and what is maybe of
page 6200
page 6201
1 confusion to the Court, we redacted anything that didn't
2 relate to the issues. It's the polling data that is just
3 recorded on that page.
4 There is a copy of this public document from the
5 defendants' files and that's why it has these black strips on
6 it. It's just polling data on the question of addiction.
7 MR. BERNICK: I wasn't aware that was being taken.
8 That is highly selective --
9 THE COURT: I'm going to take out that whole page,
10 it's incomprehensible. . The prior page can stay in. The next
11 page 19 can stay in. I think we'll keep out all the text,
12 it's just too much.
13 If you want the tables in you could have them on
14 pages 18 and 19. You can have the cover sheet, the summary of
15 findings, which I have checked, I have checked those pages.
16 The bottom of page ten and the next pages are out.
17 Summary chart B is in.
18 Medical facts study tested is in. The rest of it is
19 out.
20 MR. BICKS: Can we just look at the last three pages,
21 it is just a conclusion summary section of the data before,
22 that may be a way to shortcut --
23 MR. BERNICK: Your Honor, at this point the text of
24 this is the problem. There is an explicit commentary.
25 MR. BERNICK: The whole purpose of the excise is a
page 6201
page 6202
1 commentary --
2 THE COURT: Just what I indicated. 50220, only pages
3 indicated.
4 MR. BERNICK: Reflecting on our objection, this is a
5 report that deals explicitly with the adequacy of the warnings
6 after 1969. The only purpose for which it was created, to say
7 that the warnings were not adequate. It's coming before this
8 jury. We don't have our own experts to address it. The jury is
9 told that that is not before them.
10 We want to also put in the report that deals with
11 synergy.
12 THE COURT: Let's see what that portion is.
13 MR. BERNICK: Appendix A simply reflects the Swedish
14 warnings that conclude as one of the rotational warnings --
15 THE COURT: Let me see it.
16 MR. SHROEDER: We'd have to get it.

17 MS. TEDDER: Your Honor, I would just like the record
18 to reflect Mr. Westbrook and I have had conversations and
19 plaintiffs are agreeing to withdraw plaintiffs' Exhibit 80012.
20 THE COURT: 80012 is withdrawn.
21 MS. TEDDER: Yes.
22 Thank you, your Honor.
23 MR. BERNICK: There are only two other rebuttal
24 documents that I would like to take up. One is 44111. This
25 is draft meeting of the tobacco advisory counsel, which is in
page 6202
page 6203
1 Britian, and it talks about the potential impact of product
2 liability litigation, including specifically, as you will see
3 in the middle of the first page, what happened with Mansville
4 with product liability cases involving asbestos.
5 THE COURT: Excluded.
6 MR. WESTBROOK: Could I be heard for just a moment.
7 This is relevant to an issue that is now in the case as part
8 of the instruction, we have to make a showing that the
9 defendants were aware that asbestos claimants were likely to
10 be compensated by somebody and they could be on the hook --
11 THE COURT: How does this show it? Here are the two
12 pages handed to me.
13 MR. WESTBROOK: Yes, your Honor. The portion of the
14 document.
15 THE COURT: It says product liability.
16 MR. WESTBROOK: The industry is acutely aware of the
17 impact. We have already seen the demise of the Mansville
18 Corporation. Any breaking of ranks could have the most dire
19 consequences.
20 What they're talking about is a concern that these
21 people are being compensated by Mansville, if Mansville drops
22 out they will be on the hook.
23 MR. BERNICK: That is not relevant to the issue that
24 counsel refers to. The issue that counsel referred to is did
25 we know that there were people out there who would be
page 6203
page 6204
1 compensating claimants such that we then embark on a scheme to
2 defraud those that would be compensating claimants. This is a
3 document that we might be sued and we'd be taking their
4 place --
5 THE COURT: I don't want it. Excluded.
6 MR. BERNICK: Exhibit 10021, I don't know what part
7 you want to use, basically this is a similar presentation that
8 was made to the BATUS board at the same time, how there is
9 litigation in the United States, and it talks about the
10 prospect of product liability litigation is still sending up
11 shocks to Johns Mansville's, the serious threat to the tobacco
12 industry be brought into the asbestos litigation. This is all
13 about asbestos lawsuits against the industry.
14 THE COURT: Let me see it.
15 MR. WESTBROOK: You have just heard in some of these
16 video depositions that the number of claims in the Mansville
17 bankruptcy went up exponentially. This goes to the issue we
18 think has been put centrally into the case, the tobacco
19 industry was aware that there were people seeking compensation
20 out there and certainly gives them a motive or continuing to
21 do what they were doing, that is to keep their heads down and
22 to mislead people concerning synergy, and I have tabbed
23 certain parts of the document.
24 THE COURT: What parts of the document?
25 MR. WESTBROOK: The first sentence, which introduces

page 6204

page 6205

1 the environment itself has grown hostile as they see it.
2 Then your Honor, there is a section on page 14 --
3 MR. BERNICK: I don't know what counsel is pointing
4 to.
5 What page?
6 MR. WESTBROOK: 14, the second full paragraph.
7 THE COURT: I don't think I want any of this at this
8 stage.
9 Excluded.
10 MR. BERNICK: That is all I think that we have with
11 regard to documents except Ms. Tedder has one, we want to make
12 sure to make motions at this time.
13 THE COURT: Are there any other documents?
14 MS. KEARSE: The documents used in the
15 cross-examination of Dr. Mendelsohn, I think we're in
16 agreement, all except for one document. We're going to seek
17 to admit those. They have not been previously admitted.
18 MR. SHROEDER: We did have one objection to one
19 document only.
20 THE COURT: This is Court Exhibit 103. Mendelsohn
21 cross.
22 MR. SHROEDER: The one objection I have, one of the
23 documents that is in here is a personal letter from Dr.
24 Selikoff. As it turns out to your Honor, it's blanked out,
25 it's clearly hearsay, and I think the suggestion was made on

page 6205

page 6206

1 one of the charts --
2 THE COURT: What number is it?
3 MR. SHROEDER: M20I. The suggestion that was made on
4 the cross was that this was a study by Dr. Selikoff.
5 THE COURT: May I see it?
6 (Shown to Court.)
7 THE COURT: Excluded.
8 MR. SHROEDER: Thank you, your Honor.
9 Can we redact that part of the chart that quotes from
10 that document.
11 MS. KEARSE: The attached is an article.
12 THE COURT: I can only deal with 20I, which I'm
13 excluding.
14 What is the next application?
15 MR. SHROEDER: The request is to strike that portion
16 of the cross chart that is otherwise being admitted that
17 quoted from this letter.
18 MS. KEARSE: That I is not a complete 20I.
19 20I --
20 MR. SHROEDER: Unless you can tell me that the quote
21 comes from the scientific.
22 MS. KEARSE: I will check the quote.
23 MR. SHROEDER: I will ask that it be stricken subject
24 to what she wants to do, if they can find an identical
25 article.

page 6206

page 6207

1 THE COURT: I'm giving the court reporter Court
2 Exhibit 103. Would you type all of those documents at this
3 point in the record as having been admitted.
4 MR. WESTBROOK: At this time we would hand up
5 rebuttal documents and your Honor has excluded 44111 and
6 10021.
7 Your Honor, I believe for the record there were some

8 other portions of 10021 that was read to a witness.
9 THE COURT: This is Court Exhibit 4, rebuttal
10 documents --
11 MR. WESTBROOK: Did you say four?
12 THE COURT: 104 admitted.
13 MR. WESTBROOK: 38472. This is a document, it's a
14 Reynolds document and deals with Reynolds having a
15 relationship with Dr. Peter Lee and also Dr. Peter Lee sending
16 information directly to the tobacco institute.
17 Throughout this case the defendants have attempted to
18 distance themselves from Peter Lee and the defendants brought
19 a witness who was connected with these issues, such as Dr.
20 Cashman. I cross-examined him. He was from Philip Morris and
21 I across examined him as to Philip Morris connection with Dr.
22 Lowe.
23 They brought Dr. Townsend and he was not familiar
24 with the Lee situation. These are to meet the defendants
25 argument that they were not connected with

page 6207

page 6208

1 Dr. Lowe.
2 MR. KRAUS: Those arguments were made during the
3 plaintiffs' case. They were dealt with at the end of the
4 plaintiffs' case, your Honor, through an instruction you made
5 to the jury with respect to a document that Mr. Westbrook
6 proffered about a 1979 communication that Dr. Colby and Dr.
7 Lowe had. This document should have been offered on the
8 plaintiffs' case, if at all.
9 This document deals only with Dr. Colby's
10 relationship with Peter Lee or his knowledge of Peter Lee
11 through the European committee, not any activities in the
12 United States.
13 Finally, your Honor, it deals extensively with work
14 being done by Mr. Lee on passive smoking and advertising
15 studies, neither of which have any relevance to this case.
16 MR. WESTBROOK: I agree to take that out.
17 THE COURT: Take it out. And otherwise it's
18 admitted.
19 MR. WESTBROOK: Thank you.
20 I'm giving the reporter Court Exhibit 104. Would you
21 list in the record at this time all of the exhibits listed on
22 that.
23 Next.
24 MR. BERNICK: Your Honor, we're --
25 MS. KEARSE: 009 and 006 were two demonstrative

page 6208

page 6209

1 charts. Plaintiff' say that the claims reviewed with Dr.
2 Mendelsohn along with notes go to the documents.
3 THE COURT: 006 and 009 are in evidence.
4 MS. KEARSE: We want to put the underlying claims
5 that were reviewed to come up with those numbers so the jury
6 can assess what she reviewed to come up with her analysis
7 there.
8 THE COURT: Just the chart you used. You just used
9 one chart in cross-examining.
10 MS. KEARSE: That's all we had time to do.
11 THE COURT: I didn't stop you.
12 MS. KEARSE: Those are defendants' charts.
13 THE COURT: You used one chart on cross examination,
14 right.
15 MS. KEARSE: Yes.
16 THE COURT: Give it a number and that will be

17 introduced.
18 MR. SHROEDER: You moved that one.
19 MS. KEARSE: We feel that the underlying data that
20 went into the chart so that they can assess from her
21 testimony.
22 THE COURT: Denied. Not at this stage.
23 MS. KEARSE: Thank you.
24 MR. WESTBROOK: We also have Mr. Molster had read to
25 the Court a document that the Court admitted concerning
page 6209
page 6210
1 tobacco advertising used to have people switch brands. We
2 would like to offer in rebuttal 162 from the surgeon general's
3 report that addresses that issue, whether advertising is only
4 to get people to switch.
5 MR. MOLSTER: You didn't allow that document into
6 evidence. You denied our request.
7 THE COURT: That is correct.
8 MR. MOLSTER: On brand switching.
9 MR. WESTBROOK: If it's not we won't need that piece.
10 THE COURT: I kept it out, I thought.
11 MR. BERNICK: 50220, which is the staff report. This
12 is the report that we want in. Appendix C, which is a list of
13 the Swedish rotational warnings. There is no discussion of
14 staff conclusion or any other content that we'd seek to offer.
15 THE COURT: Put it in. Is this going to be part of
16 that same document.
17 MR. BERNICK: Part of that same document.
18 MR. BICKS: The question of the rotational warnings
19 you ruled was out of the case and would not allow us to go
20 into, and now the FTC report that is cited by the surgeon
21 general in 2000 deals with consumer awareness. It has a
22 chapter that deals with the efficacy of warnings, which we
23 have not put anything in with respect to this particular
24 report.
25 THE COURT: It may be just as easy to keep out the
page 6210
page 6211
1 whole report. If you are going to put in that they will put
2 in that. Do you want the report for your purposes?
3 MR. BICKS: Yes.
4 THE COURT: Then their portion will go on.
5 MR. STENGEL: We have a list documents used in the
6 cross-examination of Professor Steinbar, Wacker and Heckman.
7 The letter went out and I want to alert counsel to the fact
8 that we'll be moving those in.
9 MR. BERNICK: I can't deal with that. If they want
10 to proffer something that was here this morning, I cannot sit
11 here and represent the case, subject to further arguments with
12 regard to the documents that they're going to be introducing,
13 it just doesn't work.
14 THE COURT: Excuse me.
15 Do you have anything that you wish to introduce at
16 this moment?
17 MR. BERNICK: No.
18 THE COURT: I will now hear whatever the plaintiffs
19 want to introduce, without your closing your case for the
20 defendants.
21 MR. BERNICK: Okay. We were not closed and you
22 wanted to hear what they're going to offer.
23 THE COURT: I don't want dead time while documents
24 flow back and forth.
25 MR. BERNICK: I don't know how -- your Honor is more

page 6211

page 6212

1 familiar with the rules than I am. I don't know how it's
2 possible for our case now to be suspended while they put in
3 their rebuttal case. We don't think they should have a
4 rebuttal case --

5 THE COURT: Excuse me. If you wish I will suspend at
6 this moment, send the jury home and we'll spend the rest of
7 the afternoon on these documents. I think it's a waste of
8 everybody's time.

9 MR. BERNICK: The problem is, I don't know what is on
10 that list. I don't know how on behalf of my client I can
11 agree to anything that pertains to that list.

12 THE COURT: I'll allow you to reopen if there is
13 something surprising.

14 MR. BERNICK: We're reserving the right for a
15 surrebuttal.

16 THE COURT: Correct.

17 MR. BERNICK: If we're now closing and we have the
18 surrebuttal, we'd renew our Rule 50 motions. We would also
19 renew or motion to strike the testimony and the model with
20 respect to Dr. Harris and everything based upon it, and we'd
21 object to any rebuttal case.

22 We don't feel it's appropriate to have a rebuttal
23 case and we're prepared to make a more specific Rule 50 motion
24 at the end of the afternoon not to take up the time of the
25 jury.

page 6212

page 6213

1 THE COURT: Decision reserved.

2 The stipulation on mailings is Court Exhibit 105.

3 Current jury charge for discussion purposes is 106
4 now being distributed.

5 Court Exhibit 98 Federal Trade Commission staff,
6 portions are granted in part, excluded in part pursuant to the
7 rulings just made.

8 Avoiding dead time on Exhibit 104, one of the items
9 the counselors, the second group, and I have conferred with
10 counsel for Reynolds and they had objection to duplicates and
11 I have agreed to take them out. They wanted us to redact all
12 the material in the margins in the margins; I agreed to do
13 that.

14 They wanted us to take out the letters to, any
15 letters to students, your Honor, and we refused to do that on
16 the ground Professor Martin's issue, and the Court may
17 remember when I showed Professor Martin a number of letters,
18 he said this is the fourth letter, the fifth letter, he may
19 have had inspirations on the stand to try to minimize the
20 number of those letters; we have a few more in for that
21 purpose.

22 I think they also want to preserve their objection to
23 consumer letters as a whole as to that and we have some
24 redaction. If there is an issue about anything in there about
25 race, we'll take that out.

page 6213

page 6214

1 MR. SHROEDER: We do have live witnesses here. I will
2 hand up a brief on this. If we could deal with those, since
3 he will, he will not publish them in terms of admissibility
4 later.

5 THE COURT: I'll be happy to do that.

6 MR. WESTBROOK: Unless there is a new issue, I would
7 like to get them set. If we have a minute to take them up.

8 MR. BERNICK: We're close to not finishing up.
9 THE COURT: I would like to get the jury in here.
10 (Jury present.)
11 MR. BERNICK: One more document. This is 76196.006.
12 It's one of the marketing records from the National Asbestos
13 Complaints, May 15, 1980. This is an excerpt from page 48.
14 Smoking messages:
15 Our research probed the views and feelings labor
16 leaders and rank and file workers have about cigarette
17 smoking. In the focus groups, nearly all respondents readily
18 admitted workers should stop smoking, especially anyone
19 working around asbestos. Union leaders feel efforts to
20 convince workers to stop smoking would be most effective if
21 handled in work shops and regional conferences. NCI's smoking
22 cessation research shows individuals involved in support
23 groups are more likely to stop smoking than individuals just
24 receiving mass media message on this topic.

25 THE COURT: What is the date of that?

page 6214

page 6215

1 MR. BERNICK: May 15, 1980.
2 With that, your Honor, we rest our case.
3 THE COURT: Yes, subject to minor problems on
4 documents that may arise. We put in a lot of documents in
5 your absence throughout the trial, many of which will be
6 referred to in the summation and others will not be; but they
7 will be available to you.
8 Is there any rebuttal?
9 MR. STENGEL: Yes, your Honor. The plaintiffs recall
10 Dr. Jeffrey Harris.
11 THE COURT: You are still under oath, sir.

12
13 J E F F R E Y H A R R I S,
14 having been previously sworn resumed the stand and testified
15 further as follows:

16 MR. BERNICK: May I proceed, your Honor?

17 THE COURT: Yes.

18 DIRECT EXAMINATION

19 BY MR. STENGEL:

20 Q Good afternoon, ladies and gentlemen. Good afternoon,
21 Dr. Harris?

22 A Good afternoon, sir.

23 Q Now, we invited you back for the purpose of updating some
24 of the material that you testified about earlier, and in
25 particular respond to some of the testimony of defense expert

page 6215

page 6216

1 witnesses.

2 Have you reviewed Dr. Wecker's testimony?

3 A Yes, I have.

4 Q And Dr. Wecker offered the opinion for insulators
5 received from Dr. Selikoff regarding the combination of
6 asbestos and tobacco do not result in higher quit rates as to
7 the insulators.

8 Is that contrary to your opinion?

9 A Yep.

10 Q I'm talking of the of contentions that Dr. Wecker
11 presented to the jury.

12 Let's talk about his CPS-2 analysis.

13 A Yes.

14 Q Dr. Wecker, testified this analysis supports his
15 information, that information did not matter to the
16 insulators?

17 A That's what he testified to.
18 Q You have seen his testimony in the transcript, correct?
19 A Yes, I have. It wasn't here, but I read it.
20 Q He made reference to having some sort of comparison that
21 Dr. Selikoff had done?
22 A He tried to compare the insulators that Dr. Selikoff
23 worked with to a different group, that would mean who
24 participated in a big narcotic analysis study, CPS 2, cancer
25 prevention study.

page 6216

page 6217

1 That was a study done by the America Cancer Society
2 that started in 1982 and I believe he testified to that
3 already.
4 Q I said he was doing what Dr. Selikoff had done; is that
5 your view of what he did?
6 A No, I could see as an attempt to do that, but I don't
7 think it was a successful attempt.
8 Q Why do you believe that?
9 A Well, you got the insulators which are the informed
10 group, then you have to have a comparison group which really
11 should, asbestos workers that didn't get the information from
12 Dr. Selikoff, so you want to compare asbestos workers who got
13 information with other asbestos workers who didn't.
14 That means that when you studied the American Cancer
15 Society's group you should pull out the asbestos workers to
16 match that the insulators. You cannot pull out school
17 teachers, pharmacists, doctors and lawyers; you have to match
18 asbestos workers with asbestos workers.
19 That's what I think the problem in Dr. Wecker's
20 analysis is. You have got to match like we're, like if you're
21 going to do a valid study, to see whether the information that
22 Dr. Selikoff gave really mattered.
23 Q You would be prepared to illustrate his analysis?
24 A Yes.
25 Q The jury has seen this in the cross of doctor we can

page 6217

page 6218

1 ear. This is plaintiffs' Exhibit 9.
2 A Is there any way you can zoom in? If you could zoom and
3 move it so you are at the top left, even a little further over
4 and help me; to the very top left it says --
5 THE COURT: You can take the pointer and go over --
6 give him the pointer. This is a list I prepared and the idea
7 of my original study was every time you have an insulator, say
8 one in 1910, one of the older insulators, you got to match the
9 insulator with someone else who was born in 1910. If you find
10 somebody in 1920, you get someone from 1920, so they will be
11 matched by age.
12 The next thing, you should make sure that the
13 insulator is matched with an asbestos worker. Dr. Wecker's
14 program, computer program, he relied on a measure of asbestos
15 exposure which was different from that, and that program or in
16 the original Cancer Society study, there was a question, are
17 you regularly exposed to asbestos in your work or your daily
18 life; and if a person said yes to that question, then that
19 became a match mate.
20 It turns out that the problem was lots of
21 schoolteachers and administrators and pharmacists and doctors
22 and lawyers said oh, yeah, I've been exposed to asbestos for
23 years; apparently worried about asbestos in the building.
24 In order to illustrate this point, I show some of the
25 match mates. I don't know -- it's almost too light to see. I

page 6218

page 6219

1 don't know if people can see it.

2 THE COURT: I can turn off the lights.

3 THE WITNESS: This is the insulator year of birth.

4 That is the number of years that the insulator worked in
5 insulation in the union; unfortunately in this computer
6 program, that insulator was matched with another person born
7 in 1910 who graduated school education and who said he was
8 exposed 72 years to asbestos.

9 Now, there comes a point where you have got to stop
10 doing computer runs; this is what I teach my students, you
11 have to use your head. No computer run will substitute for
12 critical analysis and thought for your own judgment, whether
13 you are looking at good numbers or bad numbers.

14 Next to this is the education, not of the insulator,
15 but of the person matched with the insulator, since that
16 person originally was a doctor that went to graduate school,
17 many of the insulators. If this is a study done in 1982, this
18 insulator is already 72 years old. He's likely to be
19 retired. He gets matched against somebody who is also 72,
20 they probably will retire too, they could be retired.

21 This is a case of a doctor who previously, before he
22 was retired, worked as a physician and now maybe he has a
23 part-time sales job; that is hard to tell. He reports his
24 current occupation, that he was a physician. If this could be
25 moved over a little bit. I just want to stay with that case.

page 6219

page 6220

1 That is a little too far over. Let this come in, if that is
2 okay.

3 The American Cancer Society study asked people about
4 their homework, history, and not just what their current job
5 was. If a person says I'm retired, or I'm just working
6 part-time now but retired, they ask him what was your main job
7 before you retired, and this person was a doctor before he
8 retired.

9 Then they ask him, aside from that, the next most
10 important job, and some of the other people, and apparently he
11 also was a teacher. I don't know whether this is a college or
12 medical school professor. The breakdown was not enough. He
13 was a doctor for 73 years and a teacher for eight years.

14 Dr. Wecker's program then classified this person in
15 terms of their current occupation and his program classified
16 this person since the current occupation was retail sales, as
17 a sales worker. If you could move back over to the extreme
18 left, again you could see the older insulators there likely to
19 be matched with people who are currently retired.

20 If you get down to somebody who was born in 1925, the
21 insulator himself worked for 42 years, that insulator was
22 matched in the program with an individual who said he was
23 exposed to asbestos for 57 years, and who worked as a teacher
24 for 33 years.

25 You might ask how can a person who thought he was

page 6220

page 6221

1 exposed to asbestos for 57 years, be a teacher, get matched
2 with somebody who worked for the union for 42 years? The
3 answer is that is the way the computer program worked.

4 There was a line of code in the program that picked
5 the maximum number of years of asbestos exposure. Obviously,
6 this list of matches which show doctor, teacher and managers,
7 does not reflect all the 1,800 people who were at any

8 particular time.

9 He had to be matched but the majority, the great
10 majority of the people who were matched to the insulators in
11 comparison were not blue collar workers at all, and therefore,
12 this chart illustrates that you got to go behind the computer
13 program to see the way it works.

14 My conclusion is you shouldn't be matching the
15 insulators against people who said that they were exposed to
16 asbestos in that study, because you can get mixed up as to
17 what that question meant, and instead you should look at the
18 work history and you should find who said I worked in a
19 shipyard, I had worked with automobile brakes, I had worked
20 spraying on insulation on pipes and boilers; that is what you
21 should match them with, and you should not be matching the
22 insulators with people that went to grad school, you should
23 match them with people that had no more than a high school
24 education, because that is what Dr. Selikoff accepted was the
25 right match.

page 6221

page 6222

1 Q What is the consequences of matching teachers and
2 physicians and insulators?

3 A You are matching the quit rates with lawyers and doctors
4 and teachers, I don't think that is a fair match.

5 Q With higher educational levels --

6 A I think I have written about, when you have that
7 professional level of education, you have higher quit rates.

8 Doctors quit rates were quite high during the '60s
9 and '70s. I wrote quit at the beginning; it was quit rate.

10 Q I think you had shared with the jury your general
11 conclusion of what the chart meant for Dr. Wecker's analysis?

12 A Yes.

13 Q Now, are you also aware that during lunch break
14 Dr. Wecker did a new analysis of the CPS 2 data that he showed
15 in the afternoon, that controlled for blue collar workers?

16 A I know that he produced an additional program that
17 attempted to control for education and blue collar, and I have
18 seen that program, yes.

19 Q Have you analyzed the lunch hour presentation or
20 analysis?

21 A I did analyze the program, yes, I did.

22 Q Do you have an opinion as to whether the lunchtime
23 program removed the bias that you saw in the first attempt?

24 A Yes, I do have an opinion about that.

25 Q What is that opinion?

page 6222

page 6223

1 A He tried again, but again there were problems. In
2 particular, that computer program had two problems, which
3 again illustrates you cannot just run the computer, you have
4 to think.

5 The first problem was that when, the computer program
6 matched the insulators by education, 40 percent of people who
7 were matched had more than high school education, and 30
8 percent of them had some college education. If The program
9 didn't match You get into trouble.

10 The second thing, the program only compared people by
11 current occupation. You got to do the whole work history. A
12 retired person could have been exposed to asbestos years ago.
13 As a matter of fact, since one-sixth of those insulators were
14 already retirement age, if you actually found a match made of
15 a 70 year old insulator that was still working climbing
16 ladders, or lifting bales of hay, a person who is 70, who is

17 still working at that age, probably quit smoking, he's
18 probably pretty healthy.

19 You have to be careful. The right thing would have
20 been to match the insulators with people that had the high
21 school education, that's what the insulators did, and you
22 would find people, whoever worked with asbestos, and one of
23 the real asbestos occupations for at least ten years, even if
24 they weren't retired, maybe in the past, and that would be the
25 right to do the match.

page 6223

page 6224

1 Q Did you do that kind of analysis?

2 A Yes, I did.

3 Q Let me put up Plaintiffs' Wecker 11. The jury saw this
4 during the course of the cross-examination of Dr. Wecker?

5 A That's a little too big, if that is okay.

6 Q Why don't you tell the jury what this depicts.

7 A I don't think I need to get down for this unless there is
8 some questions about it. The horizontal is just time, starts
9 at 1950, and goes to 1985. The vertical is a measure such of
10 the percentage of people who would still be smoking if you
11 started with 100 percent.

12 In my analysis when I matched an insulator with a man
13 with a high school education and I matched insulators with
14 somebody who said that he worked in construction or
15 shipbuilding or automobile repair for at least ten years.
16 Then my match got the insulator's. Then with smoking over
17 time, that is the bottom step, then it's comparable CPS 2 men,
18 the Cancer Society prevention study men, which is the top.

19 Q You say fewer smoking. That tells us something with
20 respect to quit rates?

21 A The insulators' quit rates were higher than appropriately
22 chosen comparison group from that study.

23 Q Is this different statistically significant?

24 A Yes.

25 Q Is it as large as the difference you saw between the

page 6224

page 6225

1 insulators and the Trust claimants?

2 A I would have to go back all the way. I was here seems
3 like ages ago, where I had a table and the boxes, as you move
4 along time, the two lines separate. I compared the insulator
5 to the claimants to the Trust. That separation was greater
6 than it shows in this chart, where the insulators are being
7 compared to the people on top in the Cancer Society study.

8 Q Why is that?

9 A Well, the Cancer Society study is well known in the
10 literature not to be the representative of the U.S.
11 population. The people -- the Cancer Society -- the Cancer
12 Society volunteers are the people who are members of the
13 Cancer Society who had gone around and say watch for the seven
14 deadly signs of cancer, no lump, or a change in your skin, and
15 the Cancer Society volunteers in turn went out and enrolled
16 their neighborhood in suburbia in the study.

17 This is well known to be a highly
18 skewed suburbanized population. There is not -- even as much
19 as I tried to control for it, a population that is
20 representative of the great cross index of American.
21 Therefore, I wouldn't expect to see such great a difference.

22 Q Let's move to the second point that Dr. Wecker made.
23 Specifically, are you aware that Dr. Wecker testified that
24 quote, the quit rates of insulators were as high or higher,
25 closed quote, before 1963, as after 1963.

page 6225

page 6226

1 And that fact in his view proved that Dr. Selikoff's
2 message has no effect?
3 A I'm aware of that.
4 Q Do you agree with that?
5 A No, I disagree.
6 Q Are you also aware that Dr. Wecker testified your theory
7 requires a jump in quit rates when Dr. Selikoff gets on the
8 scene?
9 A I'm aware of the testimony.
10 Q Do you agree with that?
11 A Yes, that is true. If Dr. Selikoff came on the scene and
12 he did anything, then the quit rates ought to go up around the
13 time he was there. If Dr. Selikoff started to work in the
14 union halls in Newark and New York in 1962, if by 1966 I had
15 been shown a speech he gave, you should not add the burden of
16 cigarette smoking, but in '67 he gave a talk in Atlantic City,
17 you can't smoke, then you ought to see the quit rates going up
18 somewhere in the early to mid 1960's; that is correct.
19 Q Have you done a demonstrative to illustrate this point?
20 A Yes.
21 MR. STENGEL: This was marked as Plaintiff's Wecker
22 15. We have the one slight change, we put dark circles around
23 the claimants. Hopefully this will not be quite as
24 indescribable as the last time.
25 Can the jury see that?

page 6226

page 6227

1 THE COURT: Do you want the lights down? Will that
2 help you?
3 MR. STENGEL: It might make it a little more visible,
4 your Honor.
5 Q Dr. Harris, can you tell us what this shows?
6 A If I could get down, it would help.
7 THE COURT: Yes.
8 Q There is the raw data on quit rates. The horizontal is
9 again years, 1945, 1950, 1955, 1960, all the way to 1980. The
10 vertical is the quit rate which means out of any group of
11 people who were smoking, what percent quit. Not everybody
12 quit smoking lickety split. You could get a quit rate of
13 zero, one percent; six percent is a high number in terms of
14 smoking.
15 Each triangle is the quit rate of an insulator, of
16 the group of insulators in a given year and each circle is the
17 corresponding measured quit rate of the claimants. As I teach
18 students at MIT, if you want to do a statistical model, then
19 you show your audience the line that you want to connect.
20 But if you want to be true to the data, you show the
21 dots and you have your audience connect the dots for
22 themselves. Here are the dots. Now, before the mid 1960's,
23 say around here, it looks like there may be some -- the
24 triangles are higher than the circles.
25 In fact, you could see there are a couple of

page 6227

page 6228

1 triangles where 42 insulators appeared to quit from 5, 42 in
2 '57, and there are some other bumps.
3 Q What do those suggest?
4 A Those are the round-off that I talked about in my
5 testimony before. You have insulators who were surveyed in
6 1982, people who quit smoking a while ago, do what is called
7 telescoping, they can't remember when they quit. Some people

8 remember the exact date, but a lot of people that
9 long ago can't remember, somebody in 1982, oh, yeah I quit 30
10 years ago, they don't say 29 and a half; and that's the 30
11 years ago, exactly in 1952.

12 Those bumps that telescope which people push the date
13 that they put back add to what appears to be a slightly higher
14 quit rate prior to -- early 1960's. But after that, the
15 distance between the triangles and the circles gets greater.

16 Q How is that significant to your analysis?

17 A My reading of this all along has been that something
18 happened after the 1960's. But I will show the raw data for
19 anyone to decide themselves. However, if an analyst in a
20 statistical model, a computer run, they could get that on
21 average the triangles were maybe one percent and the circles
22 were a half of a percent. One percent over a half a percent
23 is two to one. Then over here.

24 Where you get out here, you got a five percent, maybe
25 there's areas of two and a half percent --

page 6228

page 6229

1 MR. BERNICK: At this point we have the line being
2 drawn with the pointer that is going up and down. I'm not
3 sure if this reports to be a quantitative analysis. The record
4 should indicate that Dr. Harris is simply taking his stick and
5 putting up the data so the written record is clear what is
6 taking place.

7 A I'll be happy to say what I'm doing with the stick.

8 THE COURT: Go ahead. You will get your directions
9 from me.

10 A In other words, if you are doing statistics, you would
11 say that is two to one and that that is two to one, so there
12 is no difference. I could do no more than leave it to the
13 jury or anyone else to make up their own minds as to why there
14 is a possible difference, no matter how small I could
15 elaborate, if that is an issue.

16 Q Now, do you see any movement in the data points that are
17 relevant to when Dr. Selikoff was most active?

18 A As I received, I think there is -- the difference widens
19 and I'm pointing with my stick after 1963, so that the
20 absolute difference gets greater.

21 Q Now, during Dr. Wecker's testimony, Mr. Bernick read him
22 part of your deposition where you talked about the reliability
23 issues round looking year-to-year data?

24 A Yes.

25 Q What's your response?

page 6229

page 6230

1 A Well, it is true that you got to be careful when you look
2 at dots not to overdo it. It's not true that because it went
3 from 73 quitters in 1962 to 57 quitters in 1963 to 34 quitters
4 as I'm pointing in 1964, that the quit rate went down. That
5 is because in 1982 a lot of people said that they quit 20
6 years ago; that is a round-off, what my original testimony
7 about dots was; you can't just connect the dots one year after
8 another. That is too strong.

9 You do have to look at the overall big picture.
10 Nonetheless, when it comes to deciding what this means, you
11 can't just run any old computer run -- enough computer runs.
12 You got to use your critical judgment and decide what you
13 think.

14 Q You think this data is consistent?

15 A That's what I think. If someone disagrees with me,
16 fine.

17 Q As to your analysis, your done with this chart?

18 A Yes.

19 Q In addition to this analysis, your CPS 2 analysis
20 suggests there was a jump in insulators quit rates?

21 A You would have to go back to the chart that --

22 MR. STENGEL: Plaintiff's Wecker 11.

23 A Okay.

24 The answer to your question would be yes, that
25 analysis did also enlighten me about the question of whether

page 6230

page 6231

1 the quit rates changed after the 1960's.

2 Q Let's move onto the third area of Dr. Weaker's criticism,
3 which was the opinion that your results were biased by your
4 selection of stop date data?

5 A I'm not sure that I answered your last question
6 correctly.

7 THE COURT: Go ahead.

8 A If I were permitted, I would point out those curves start
9 to separate right around the time that Dr. Selikoff got on the
10 scene.

11 Q Thank you.

12 Moving on, you are aware of the third criticism?

13 A Yes.

14 Q That had to do with your choice of data?

15 A I understand that. It had to do with the interpretation
16 of the audit of the claimants to the trust and the use of that
17 audit to compare the insulators not to the Cancer Society, but
18 to the claimants itself.

19 Q Just so the jury has it in mind, what are the sources of
20 data available to when somebody stops smoking, between the
21 insulators and the claimants?

22 A The insulators were invited to checkups by Dr. Selikoff.
23 He went around the country with his team, 19 cities around the
24 country. As part of research studied the insulators, answered
25 question about their smoking, and they got free checkups.

page 6231

page 6232

1 In the case of the claimants, the claimants submitted
2 information about their smoking from two sources. One was a
3 form that they filled out at that they asked for money from
4 the trust, and another was the information that doctors,
5 nurses and other medical personnel, sometimes it was
6 respiratory technicians and radiologists put down about
7 claimants smoke.

8 When it comes to the claimants and not the
9 insulators, you got what they wrote down to the form, the
10 proof of claim form, and what was in the medical record two
11 sources.

12 Q Do you understand Dr. Wecker's primary criticism to be
13 related to your failure to use the POC or proof of claim form?

14 A Yes. The issue that doctor Wecker raised actually was
15 not what was in the underlying claims forms or in the medical
16 record, but how I interpreted the computer file that
17 summarized the audit.

18 Dr. Wecker expressed concerns that I misinterpreted
19 that computer file, had not used the information appropriately
20 and then when, as he suggested, one does it a different way,
21 you get different quit rates for the claimants.

22 Q Before we get to the details, I think you made it clear
23 on direct that your preference was to use medical record data
24 for stop dates?

25 A Yes. As I testified earlier, what medical personnel

page 6232

page 6233

1 write down about an individual smoking, is far and away more
2 reliable than what a person writes down when they are asking
3 for money from the trust.

4 In many, many cases it would be the lawyer or
5 paralegal when, if they file the suit and still in other cases
6 it would be a surviving spouse years later, when trying to
7 collect money.

8 Q As part of that opinion, the route of that, you are a
9 physician yourself?

10 A Yes.

11 Q Was your decision not to use the POC quit information
12 related to your understanding whether the Trust vouched the
13 POC information as reliable?

14 A Yes, it was.

15 Q And in the course of deciding whether or not to use the
16 POC quit date information, did you understand, make any
17 inquiry of your own to determine the reliability of that data?

18 A It has been a year now, but when I first got the results
19 of the audit which took a sample of these trust claimants and
20 had a computer file with both their medical and their claim
21 forms, I also got the underlying records, the actual forms
22 that the people filled out and doctors' notes.

23 And before I did any analysis, I had to decide, am I
24 going to use the forms that people filled out that said how
25 much they smoked or am I going to use the doctors' notes? I

page 6233

page 6234

1 went to the people in the trust who put all of this stuff on
2 the computer and I said don't you have a big computer file of
3 all the answers to their questions about smoking; and they
4 said no, we don't keep a computer file of any of the smoking
5 information on the forms, because we never considered it
6 reliable.

7 That added to my conclusion from the very beginning
8 the right thing to look at is what medical people said when
9 they were writing medical evaluations about these claimants.

10 Q Did you form a conclusion about the reliability of POC
11 date today?

12 A I decided, based on all of that information, as well as
13 my actual examination of the charts, that the POC data, the
14 claim forms, not the doctor's note, but the forms was not
15 reliable, and you had to go with what the doctor's note was.

16 Q Have you brought some examples of POC and medical records
17 to Court today?

18 A Yes.

19 Q What I will show you marked as Harris Rebuttal 1, a
20 Mansville proof of claim information, 0005890. For purposes
21 of the record, we redacted the name of the individual
22 claimant. I would also represent to the Court this is not a
23 complete file. This is selected pages out of the claim form,
24 but I will provide you a copy, Doctor, and so the jury can
25 follow along, I'm standing at the Elmo and move the document

page 6234

page 6235

1 in my limited ability so that you can communicate to the jury
2 what you are looking at and why it's important when you review
3 a POC.

4 A I hope the black and white document is clear. I'm all
5 right on my screen. Okay. I would like to emphasize that
6 Mr. Stengel is right, the underlying form of this person is an
7 inch thick. This isn't each page. It certainly isn't every

8 form that was filed by every person in the trust. This is
9 just one. I'm using it to illustrate certain points.
10 There is the front page of the proof of claim form at
11 the time for somebody who had already died and surviving
12 spouse or representative is filing the form, and Mr. Stengel,
13 if you could point on the top left, or if you want, I could
14 get down again.

15 Q It might make it easier if you used the Elmo yourself.

16 A This individual died on October 30, 1974; was born in
17 1922. So he died when he was 52.

18 Q When was the claim filed?

19 A 1988.

20 Q Is that all the information that extracted from the first
21 page?

22 A No, I think there is a little more. If you could move it
23 down, maybe I can without messing this up. The rest of it has
24 information, just to show it, the name of the law firm and the
25 spouse, but it's not relevant. I'm not going to take anything

page 6235

page 6236

1 away from that. What do I do?

2 Q Turn the page.

3 A Now, there are lots of things that get filled out. The
4 person lists work history, if he worked in a shipyard,
5 wherever, and you have to list all of that and show that you
6 did work in the shipyard and not for just a half an hour.

7 As part of it, there is something called the smoking
8 history. This is not the doctor's note. This is what the
9 person filled out as part of the form. The first thing that
10 is asked, type of products smoked, did you smoke cigarettes.
11 Yes. And the answer is, well, okay cigarettes; you smoked two
12 packs a day.

13 What was the starting year, 1949. In this case the
14 wife, because she is filling it out in 1988, 14 years later,
15 said it's 1949, but she doesn't know the exact year. Then she
16 says he stopped in 1970.

17 Now, in between, there are also other documents which
18 I haven't shown, lawyers' documents, correspondence between
19 people and the trust and the staff, that doesn't count. I'm
20 looking at two things, what the claimant, or in this case the
21 surviving spouse said about their smoking in the form, and
22 what the doctors, nurses, CT scanners, radiologists, X-ray
23 technicians, pulmonologist and pulmonary technicians said.

24 Q There is the proof of claim?

25 A The POC form, right. In this case this POC form has the

page 6236

page 6237

1 two dates, and according to this form he stopped in 1970. If
2 we go back, he died in '74. According to this form, he quit
3 four years before he died.

4 Q Were there medical records attached?

5 A Yes.

6 Q What is this, Doctor?

7 A This person got lung cancer. I could barely see this.
8 This is the person's admission when he got into trouble with
9 lung cancer. By then it spread to parts throughout his body.
10 This is admission and this is the admission front sheet and it
11 says urgent admit.

12 And the person was admitted to the hospital on August
13 '74 and, in fact, it describes that he worked in the
14 shipyards. Now, at this point it gets hard to read, and the
15 typical record like this would take me a good 20 minutes to
16 read through each thing. You don't zip through these. I'm not

17 showing you every doctors' note; if you move further.
18 This, I'm used to this, this is poorly differentiated
19 cancer right lung with rib extension posteriorly. It had
20 spread backwards to the rib. That person had lung cancer.
21 Other things about what the code of the diagnosis was and down
22 here, although that is not entirely the most important thing,
23 but to be complete, this says right thoracotomy. That person
24 had his chest opened to try to get the cancer out.
25 He came in in 1974, about August, and he had an

page 6237

page 6238

1 operation.
2 Q Now, the next this is what they call the admission note,
3 and this is what everybody who gets admitted to the hospital
4 gets, even in an emergency. The person came in with back and
5 stomach pain, was a 52 year old white male, and it goes on;
6 and then as part of the standard history and physical, there
7 is something called the past history.

8 Then there is social history and there it says
9 smoker, and this either says one and a half a day, it might
10 say one to two a day. Now it's possible that I read this as
11 saying smoker, maybe it says smoked. I went to the next
12 page.

13 Once they decided to operate, doctors write preop
14 orders. This is standard in the records, at least if you are
15 used to looking at them and writing in them. On August 22,
16 1974.

17 The doctors made a list of orders that have to be
18 done to get this person ready for surgery. Pulmonary function
19 tests and blood gases, electrocardiogram in the morning and DC
20 cigarette smoking; that means stopped smoking.

21 This person was smoking in 1974 and the doctors notes
22 clearly establish that he was.

23 Q What did the POC say?

24 A His wife said he quit in 1970. This took a while to go
25 through each one of those. I went through as many as I could

page 6238

page 6239

1 until I made a determination that the medical record is what
2 is reliable and not the form.

3 Q Did you bring on a second POC and medical record
4 collection for the jury to look at?

5 A Yes.

6 Q We'll call it Harris Rebuttal 2, POC 371942. And again
7 we have redacted the specific identifiers and the claimant.
8 And I will put that up and, Dr. Harris, I would ask you to --

9 THE COURT: Does this have a number?

10 MR. STENGEL: Harris Rebuttal 2.

11 A This is a claim ten years later. The form has changed,
12 but the information that is relevant here is the same. This
13 is a claim filed in August of 1988; someone born in 1933. This
14 person filed a claim for compensation for the kind of
15 interstitial lung disease and not lung cancer, and this is not
16 a deceased person. This is a living claimant.

17 As the next page shows, here is something that is
18 typed in, I don't know who typed it in, whether it was the
19 claimant or a legal representative, it's not clear, but it
20 says the person smoked from a starting year until 1982, two
21 packs a day.

22 Q This is the --

23 A This is the form that the person or the person's
24 representative fills out. Here is a medical evaluation that
25 was done -- I hope this is clear, August 16, 1995. That was

page 6239

page 6240

1 done three years before the person filed a claim, and it's a
2 medical evaluation. This record is dated August 16, 1995, and
3 physical reports that person has or is, and then it says dates
4 of exposure, talks about the asbestos exposure, it is a white
5 male, et cetera, weight and blood pressure, and then it goes
6 down to their occupational exposure, this is part of that
7 standard report.

8 Now, if you come down further, social history. That
9 is where you get the smoking, that same think that was SH in
10 the intern's admission note, he smoked for 30 years and he
11 quit two years ago in 1995, unless the doctors made a typo on
12 the 2, that person quit in 1993. Although on his form he said
13 he quit in 1982.

14 Q What conclusion do you draw?

15 A This is, among other things, a further example of the
16 mismatch between what doctors -- medical personnel wrote down
17 about an individual smoking and what the insurance form
18 shows.

19 Q At the time that you made your decision whether or not to
20 use the POC quit data, did you do statistical analysis to see
21 how your numbers would come out?

22 A You should look at the information first, decide what is
23 good and what is bad, and analyze the good and not analyze the
24 bad. You should decide what is appropriate to analyze first
25 and then analyze it. You shouldn't do the opposite, which is

page 6240

page 6241

1 going to work backwards from the result that is desired to
2 decide what is good and bad.

3 Q You have tried to obscure the fact that you were using
4 POC quit data in this case?

5 A I was not using the POC, the forms I was using the
6 medical records. I said that in my direct testimony, I said
7 that in my reports, in my computer programs, I saw lines that
8 say I will not use this information, I will use that.

9 Q As you sit here today, is it still your opinion that the
10 POC quit candidate is unreliable and should not be used?

11 Dr. Harris, is it your understanding in addition to
12 criticizing your decision not to use POC quit data, Dr. Wecker
13 did some analysis, which he claimed were better weighs to look
14 at the issues?

15 A Yes, I understand that is true. I read his testimony.

16 Q He did one analysis, which reported to be a medical to
17 medical comparison?

18 A Yes.

19 Q What is your opinion of that analysis?

20 A In my opinion, that analysis is unreliable and I could
21 explain why.

22 Q Why do you believe that?

23 A Dr. Wecker only took those records where the computer
24 summary file showed information from the
25 medical -- underlying medical data and he called that a

page 6241

page 6242

1 medical only. But in fact, even when the summary computer
2 record didn't have information on starting and stopping, the
3 actual medical charts like the one that I showed and the one
4 I'm holding up, very, very often did.

5 So when Dr. Wecker excluded almost 1300 records that
6 he said no matter, there is nothing on that. He was actually
7 excluding a group of records in, which there was a substantial

8 amount of information.

9 During that time, in fact, in my reading of the
10 transcript, the Court had asked is it possible that in taking
11 out those more than a thousand records, you would be skewing
12 the analysis, my answer would have been yes, you got quitters
13 and you got smokers. If you take more smokers out, you are
14 going to have quitters left, that is going to look like the
15 people left, look like they quit smoking.

16 If you keep the quitters in and you keep the smokers
17 in, you're going to get the right result. In fact, the very
18 first case I showed of lung cancer was a case where the
19 medical record made it absolutely clear, he smoked until the
20 date of his diagnosis, which was 1974, but it was left blank,
21 because nowhere in the medical records does it say whether he
22 started at page 13 or 20 or 25.

23 That first case is actually an example of a case that
24 Dr. Wecker had excluded when he did his -- what he called the
25 medical to medical or medical only analysis. That is the

page 6242

page 6243

1 first one. That is the medical only.

2 Q Is the medical only analysis a statistical accurate
3 representation?

4 A Not in my opinion.

5 Q He does another analysis, he takes the analysis and CPO?

6 A Yes.

7 Q Is that any more appropriate?

8 A It's not the people that he analyzed, it's people that he
9 took out that matters.

10 Q One more question about the alleged impact of your
11 determination in the POC quit data.

12 Are there other studies of the effects of smoking,
13 data of asbestos exposure that contains no POC data.

14 MR. BERNICK: I object to this line of questioning.

15 THE COURT: I'll allow it.

16 Q You are familiar with Dr. Heckman's testimony?

17 A Yes, I did read that.

18 Q You saw that several medical articles were introduced
19 during the examination?

20 A Dr. Heckman?

21 Q Yes. Could you tell us the significance?

22 A Those articles were done by other doctors that were
23 imitators of Dr. Selikoff and they tried to copy in one way or
24 another Dr. Selikoff's approach to getting the message to the
25 asbestos workers. They tested whether credible medical

page 6243

page 6244

1 information will get asbestos workers to quit.

2 Some of the studies involved what is called
3 randomization, that is you flip a coin to decide whether an
4 asbestos worker is going to get the information or either just
5 a little bit of information or nothing and then you can see
6 which group quit smoking.

7 And as I understand it, Dr. Heckman was shown a
8 number of those articles.

9 Q Did any of those articles include issues about use of POC
10 quit data?

11 A Nothing to do with the claimant to the trust. The doctors
12 doing those studies were studying their own asbestos workers
13 and measure who quit and who didn't by asking those people in
14 their own way. Nothing to do with insurance claims forms.

15 Q To summarize, do any of Dr. Wecker's opinions and your
16 opinions as to the results you presented to the jury are

17 correct?
18 A They don't alter my opinion.
19 Q Let's switch to a slightly different topic.
20 You were here last year, you presented the jury some
21 calculations of the numbers of additional claimants that were
22 generated by the model because of the defendants misconduct?
23 A Yes.
24 Q You were here before the end of the year 2000?
25 A Yes.

page 6244
page 6245

1 Q Have you -- since you were last here, have you updated
2 those numbers to reflect numbers of claims through the end of
3 the year 2000?
4 A Yep, I have.
5 Q Have you also taken further steps of assigning those
6 claims values?
7 A Yes, I have.
8 Q And your Honor, I would inquire of counsel -- I don't
9 think we need to go further than that.
10 THE COURT: Do you want to put it in?
11 Q Let me show you what we'll call Harris Rebuttal 3. I will
12 put this on the easel, Doctor. You can explain it in general
13 form to the jury.
14 What I will do, I think, if you don't mind, is look
15 at the top part and you could tell us what that is, when
16 you're finished I will move it down.
17 Describe in general terms what you did, for the jury?
18 A I will go slow and I will stop if it's inappropriate. I
19 don't know how much I will cover.
20 THE COURT: Why don't you take the pointer. It would
21 be easier for the jury to see.
22 A I generated three pages, this is my results. And they
23 represent, as I understand it, three different legal causes of
24 action, one of which is called Common Law Fraud Claim.
25 I have no comment about that other than it's my

page 6245

page 6246

1 understanding that each of the three causes of action involves
2 a different cutoff date, so in this cause of action the Trust
3 seeks -- I guess the word is damages. I don't want to step
4 out of line, for claims that were filed after the end of 1991,
5 approximately.
6 The other pages reflect calculation of claimed injury
7 for claims that were filed after the end of 1995 or after the
8 end of 1994, depending on different cutoff dates.
9 These are the claims that were filed from, I believe
10 October, something 1991, I can't remember the exact date.
11 Q 12/31?
12 A 12/31/91. The top -- there are three panels. The top
13 represents all claims that the Trust has settled, that is we
14 the Trust sent out the check and it was cashed and claims
15 where the Trust has cut a check but they didn't cash the check
16 yet.
17 The next panel is claims where the Trust has got the
18 claim already, the person filed their claim, and at least by
19 the end of last year, and the Trust is expected to send out a
20 check by the end of 2002.
21 Q Can you base that judgment on the historical judgment of
22 the Trust and how long it takes to process a claim?
23 A From the date that a claim hits the doorstep, how many of
24 the claims did they send out the check, six months, a year, a
25 year and a half, and that's how I was able to estimate how

page 6246

page 6247

1 many of the claims that the Trust so far got but were still
2 working on, how many of them were going to get taken care of
3 by the end of 2002 by 12/31.

4 The last panel is here. I relied on Dr. Forenze who
5 was here who made projections how many people were going to
6 time claims for different diseases in the future, that would
7 be for the years 2001 and 2002, and then I did a ratio for
8 that to cut it down to just those people who not only filed in
9 2001 and 2002 but had their checks cut by the end of 2002.

10 Q Its been a while since the jury saw what was marked
11 Harris 10 and 11 or 9 and 10.

12 Could you remind the jury what the rows means,
13 starting with lung cancer and the columns with defendants
14 misconduct and without defendants misconduct?

15 A All of these forms are the same. I could pick any one.
16 If I took the middle panel, which is visible now, there are
17 four different conditions that the -- that have relevant lung
18 concern, disabling BID, plain BID and pleural injury.

19 The first column is the number of claims that
20 actually occurred with what I described as with misconduct.
21 And the number of claims that would have occurred with what I
22 have described as without misconduct. Then the next column is
23 the difference, so you went from 2000 lung cancers with
24 misconduct to 1000 lung cancers cases without misconduct, that
25 is because of more smoking -- less smoking and therefore there

page 6247

page 6248

1 would be 1000 fewer lung cancers from that panel.

2 Q The Trust is not seeking compensation for pleural injury?

3 A Yes, because some of the people did not get cancer they
4 would get something else, the plural injuries would go up.
5 It's not simply that in my calculations the smoking caused
6 more disease but also more severe disease, so when you take
7 away from the smoking, there is not only going to be less
8 disease but less severe disease. It means some people will get
9 mild disease and even more people will get the mild disease.

10 MR. STENGEL: Let's mark as Harris Rebuttal 4 --

11 THE COURT: This one is three.

12 MR. STENGEL: The one on the screen is three.

13 Q I believe we can streamline there, because these are the
14 same calculation for a different claim, correct?

15 A That is correct.

16 Q And the only difference is the measuring time period for
17 the filing of claims?

18 A There is for a different cutoff date. If the cutoff date
19 is later. The total numbers in these columns will be less,
20 because there are fewer claims in issue.

21 Q Let me show you the last of these, Harris Rebuttal 5.

22 THE COURT: Which one is that?

23 MR. STENGEL: The Consumer Protection Act Claim, your
24 Honor.

25 Q This is Harris Rebuttal 5.

page 6248

page 6249

1 Dr. Harris, can you tell us where you did anything
2 different with respect to this one?

3 A An additional thing that is different.

4 Q Could you explain that?

5 A In addition to there being a different cutoff date, I was
6 instructed to make these calculations under the assumption
7 that the defendants engaged in no misconduct before the year

8 1980, as a legal matter. Therefore, the affect of the
9 defendants misconduct will be smaller than if you cover the
10 entire time period from 1954 onward.

11 In the prior chart, the number of lung cancers were
12 cut in half because of the instructions that I was given, the
13 number of lung cancers are cut by less, and the same thing
14 applies to all the conditions and all the panels in this chart
15 called consumer protection act claims.

16 Q You presume a shorter period of misconduct?

17 A It's less misconduct because I'm assuming under my
18 instruction that the misconduct only started from 1980 rather
19 in 1954.

20 MR. STENGEL: Thank you.

21 Nothing further, your Honor.

22 THE COURT: We'll take a few minutes break.

23 Would you give me hard copies of that, please. If
24 not we can Xerox it.

25 Do you have extra copies?

page 6249

page 6250

1 (Jury leaves courtroom.)

2 MR. BERNICK: Before we take a short break, two
3 things, one is logistical and the other more substantive.

4 Am I to understand the numbers that were just shown
5 to the jury are the damages that are claimed by the Trust in
6 this case?

7 MR. STENGEL: Yes.

8 MR. BERNICK: Second, I know this is not a criticism
9 of Mr. Stengel, the direct examination lasted some bit
10 longer --

11 THE COURT: We'll keep the jury. We'll go tomorrow.
12 Don't feel at all inhibited. We have all the time. I will not
13 cut you off.

14 (Recess taken.)

15 THE COURT: Will the witness take the stand, please.

16 MR. STENGEL: Since time is growing short I would
17 move admission of Harris Rebuttal 1 to 5.

18 MR. BERNICK: I don't know what it is.

19 THE COURT: Three, 4 and 5 are the three sheets with
20 the computation.

21 MR. STENGEL: One and two are the claim forms.

22 THE COURT: Yes, they are all admitted.

23 (marked).

24 THE COURT: Where is the doctor?

25 The jury will stay for an extra hour or so, and if

page 6250

page 6251

1 it's enough --

2 MR. BERNICK: We'll try to move through it quickly.

3 (Jury entered the courtroom.)

4 CROSS EXAMINATION

5 BY MR. BERNICK:

6 Q Good afternoon, Dr. Harris?

7 A Sorry.

8 Q It's all right. Let's talk about rounding; 1962, is that
9 the magical date?

10 A Just about.

11 Q And you have said that in your analysis of the Selikoff
12 data during the period '63 going forward to '83 the quit rate
13 of insulators versus the claimants were 2.1 times higher?

14 A Correct.

15 Q You acknowledged from your testimony just now that it's
16 important to your analysis that there had been a jump at or

17 about 1962, because that is when you assumed that Dr.
18 Selikoff's intervention began?
19 A Yes.
20 Q Your whole model assumes that the portion of the model
21 that deals with the quit rate, assumes that after 1962, the
22 insulators were a full 2.1 times different than the
23 claimants'?
24 A Correct .
25 Q Which would mean the insulators quit rates after 1962 had

page 6251

page 6252

1 to be 2.1 times the claimants, and prior to 1962 it would have
2 been zero times the claimants, correct?
3 A Correct.
4 Q Now, let me just ask you a couple of questions about
5 timing of the work that you have done with respect to the
6 rounding issue, okay?
7 First of all, isn't it true in June of this year, of
8 this last year, almost seven months ago, Dr. Wecker issued a
9 report in this case?

10 A He did, June something, 15, I think.

11 Q Is it also true that Dr. Heckman issued a report during
12 June of last year?

13 A June 7th.

14 Q Isn't it true that both Dr. Wecker and Dr. Heckman
15 explicitly criticized your model and this portion of the
16 model, because they believed that you hadn't taken into
17 account the pre '62 period of time?

18 A Dr. Wecker was everything pre '63 and Dr. Heckman was
19 1950 to '62 only.

20 Q What Dr. Wecker determined if you took a look at the data
21 pre '62, the quit rate of insulators versus claimants was not
22 zero times, but it was actually 2.5 times, although he did not
23 find the statistical difference between the two numbers?

24 A That was his estimate.

25 Q Isn't it true that even though you have those reports,

page 6252

page 6253

1 you looked at those reports, did you not?

2 A Correct.

3 Q Isn't it true, even though you had those reports, there
4 was no analysis that you did in response to those reports,
5 true or not?

6 A No, I didn't think any was necessary.

7 Q None was necessary at that time, but we you came to
8 testify before this jury during your direct examination in the
9 plaintiff's case in chief, you didn't make mention of the
10 criticism that were made by Dr. Wecker and Dr. Heckman with
11 regard to your work?

12 A I think that would be overstating the case.

13 Q Did you make mention of the criticism that they lodged
14 back, even one, when you were on direct examination?

15 A I think the answer would be yes.

16 Q Did you show the chart or any kind of diagram, any kind
17 of rounding diagram, this one right here, did you show this
18 chart, did you make up this chart at the time that you
19 testified on direct examination?

20 A Well, I think you asked me two questions. The first
21 question is about rounding, I mentioned rounding and a
22 round-off.

23 Q The chart?

24 A And the second is that I did not produce the chart of the
25 raw data.

page 6253

page 6254

1 Q You did not produce the chart during your direct
2 examination and during your cross-examination, did you?

3 A Correct.

4 Q Okay. It wasn't until after you were off the stand and
5 they were off the stand that all of a sudden you decided it
6 was pretty important to respond to what Dr. Heckman and
7 Dr. Wecker had done with your own chart, correct?

8 A Correct.

9 Q Let's talk a little bit about the chart itself. All the
10 dots on your chart,, I don't have them circled like you?

11 A You can use my chart. Actually both of these are mine.
12 I'm not a genius in terms of these artistic things. Please
13 use the other one.

14 Q There we go. Isn't it true that with respect to the
15 chart, all the little data points all, assume that you are
16 correct about your analysis of the proof of claim forms?

17 A That is correct, yes.

18 Q If we assumed a different analysis of the proof of claim
19 forms, a lot of those dots would move around?

20 A Correct. You could get it to go any way you wanted to,
21 definitely. You could make a different assumption, you could
22 move them around.

23 Q Sometimes people say there are lies, there are them lies
24 and there are statistics?

25 A Without using your judgment and common sense, you cannot

page 6254

page 6255

1 substitute pure computer runs.

2 Q You can't have a statistical model unless it makes common
3 sense, correct?

4 A Correct.

5 Q You didn't have a statistical model unless it's based on
6 the actual facts as opposed to the hypothetical facts, can
7 you?

8 A You got to use common sense.

9 Q Let's take a look at this, and as I understand it, and
10 I'm going to use the pointer and get you out, because we have
11 to get Dr. Wecker done, so we have to move through quickly.
12 You testified that some of these numbers look kind of high?

13 A They were the round-offs, every five years.

14 Q If the numbers are high, it doesn't mean that people
15 didn't quit, it means that they may not have quit in that
16 particular year, they may have quit in some other year,
17 correct?

18 A Right. It's hard to tell, there is a problem of what is
19 called telescoping, people tend to push the date back, if
20 someone is in 1982 and said they quit 30 years ago, you don't
21 know if it's 52.

22 Q Rounding could mean that maybe they rounded and they
23 actually put earlier, it could mean maybe they rounded and
24 they actually put later, correct?

25 A Although because of the telescoping --

page 6255

page 6256

1 Q Answer my question, please.

2 A Yes.

3 Q Rounding to mean they quit either earlier or they quit
4 later, correct?

5 A That is strictly speaking, correct.

6 Q Whether or not they quit earlier or later, even if you
7 eliminated all of these high points before 1963, isn't it a

8 fact that if you follow your rule, we kind of looks like
9 there, the insulators are quitting more and faster than the
10 claimants, all points prior to 1962?
11 A Yeah, if you took out the big high triangles, you don't
12 get statistically significant, but generally speaking you
13 could see there is a difference.
14 Q You could see there is a difference?
15 A Yes.
16 Q Even before 1962, if we follow your rule and looking with
your eyeball and planting the stick, there is a difference
18 between the insulators and the claimants prior to '62, true?
19 A Correct.
20 Q There is a difference between the insulators and the
21 claimants prior to '62 and after '62, correct?
22 A Correct.
23 Q Now, if we don't use that pointer, if we actually want to
24 do analysis, an analysis, isn't it true that you have done no
25 analysis to actually term quantitatively the difference

page 6256

page 6257

1 between the insulators and the claimants, say prior to 1955,
2 before these?
3 A You mean another computer run, no.
4 Q You haven't done a quantitative statistical analysis to
5 see, well, what if we eliminated these, was there a difference
6 prior to 1960; you haven't done that analysis?
7 A No.
8 Q Not another computer run. Isn't it true as we sit here
9 today, that you have done no quantitative statistical analysis
10 to determine the impact of what you call rounding; true or
11 not?
12 A I think it would be very difficult to do properly, and
13 the answer is no.
14 Q The answer is no?
15 A That is correct.
16 Q And you have here today is, you look at the numbers they
17 are higher here and here and here, but you haven't done a
18 statistical analysis to see the impact of the rounding,
19 correct?
20 A No.
21 Q Now, even though you haven't done the analysis, isn't it
22 true what you do is you simply assume, assume that the
23 difference that you can see before 1962 is in fact zero?
24 A Yes, that is correct.
25 Q Contrary to even your holding the stick up, you assume in

page 6257

page 6258

1 your model that the answer is zero, correct?
2 A Yes. Whatever the action is pre '63, I am assuming that
3 what matters is only the action post '63, that is correct.
4 Q And you are assuming from that that the difference that
5 you see post '63, the 2.1 number, post '63 number, correct?
6 A Correct. That's the ratio that you get from looking at
7 those triangles and circles post '63.
8 Q You assume that prior to '62, in comparison to that 2.1,
9 there is zero difference between the insulators and the
10 claimants?
11 A Any difference I see on that chart, I have some
12 explanation for it, but I assume it's not material.
13 Q Not material?
14 A Correct.
15 Q None of these data points are material, none of these
16 differences are material to your analysis, correct?

17 A Correct.
18 Q Even after '63, Dr. Harris, if we wanted to kind of use
19 your eyeball and kind of go like this, I cannot reach as high
20 as you can, without a statistical analysis, where would you
21 draw that line between '63 and '83?
22 A Without a statistical analysis I could only make a visual
23 impression.
24 Q Only a visual impression?
25 A That's right.

page 6258

page 6259

1 Q Visual impression is reliable enough to bring into this
2 courtroom and testify about?
3 A Yes.
4 Q And you think that the visual impression is that the line
5 gets drawn where, where do we draw the line, we connect this
6 dot and this dot or this and this. Where do we do it?
7 A We don't do it with the visual impression only, but I
8 felt after reading the testimony which challenged my analysis
9 of the 2.1, that it was important to show the line, so that if
10 any other person wanted to put it anyplace by eyeballing, by
11 having their own computer program, fine, they could draw it.
12 It's true that one cannot go past the graph to a 2.1
13 ratio without doing some kind of computer run.
14 Q Let's be candid. If you just use your eyeball, you
15 cannot draw any line after '63, can you?
16 A Looks to me like the triangle is twice as high as the
17 circles.
18 Q You could say somebody else is wrong if they said 1.5,
19 2.5, or 1.8?
20 A You could not by itself?
21 Q That is science?
22 A I think science is both, showing your raw information and
23 showing how you made a calculation from it and letting other
24 people challenge it, if they think it's wrong.
25 Q Is this why you thought it was so important to come back

page 6259

page 6260

1 in rebuttal, you have Dr. Heckman's and Dr. Harris's report --
2 A You mean Dr. Wecker's report?
3 Q Dr. Wecker's and Dr. Heckman's report, you didn't come to
4 talk about visual impression during direct examination, did
5 you?
6 A I did not show the raw numbers during my direct at all.
7 Q But you thought it was important to come and tell the
8 jury about your visual impression here today in rebuttal?
9 A I was asked to come back.
10 Q Let's go to the second subject. Let's talk about the ACS
11 2 analysis. I guess that is -- CPS 2?
12 A It's America Cancer Society. Either one is all right.
13 Q That's where you have the graph that looked like this?
14 A Yes.
15 THE COURT: Does it have a number?
16 MR. BERNICK: That was I think Plaintiff's Wecker 11.
17 THE COURT: Okay.
18 Q The question of whether there was a proper comparison,
19 this is the study that compares the insulators with the folks
20 who filled out the questionnaire in CPS 2, correct?
21 A Correct.
22 Q Once again, this was not a comparison; the fact that
23 Dr. Wecker had done the comparison, was not news to you, when
24 he testified in this case, was it?
25 A No, he mentioned his comparison in the June 15 report, he

page 6260

page 6261

1 did it over, an October report and provided the data November
2 3, and then he did the additional computer run during the
3 lunch break in his testimony. All along he has been providing
4 information about their comparison.

5 Q You knew about it in June in his report, you knew about
6 it in October in his report, you got the data in November?

7 A Correct.

8 Q And you didn't testify to it when you came in here the
9 first time, correct?

10 A I think I did testify that I compared the insulators to
11 other groups, and I may have mentioned the CPS 2. I don't
12 know if I was permitted to.

13 Q Don't know if you were permitted to.

14 You told us in your deposition yesterday that you did
15 this analysis about a week ago?

16 A The particular chart here?

17 Yes, that is correct.

18 Q When did you do the analysis? Your ACS 2 analysis that
19 was used in the cross-examination of Dr. Wecker?

20 A That was approximately a week ago, something like that.

21 Q Do you recall offering that testimony?

22 A I'm repeating myself; yes, I do.

23 Q Now, after seven months, you have decided to respond to
24 what Dr. Wecker said in his report?

25 A Well, I was asked to come back. I don't know how to

page 6261

page 6262

1 answer that. I didn't ask to respond, I was asked to come
2 here and talk about it.

3 Q This is something that the lawyers asked you to do?

4 A They said they would like me to come back and respond.

5 Q Now, you used a 2.1 number, you used a 2.1. Is this a
6 valid comparison, a valid chart?

7 A Between the insulators, between the CPS 2 men, that's the
8 best I could do.

9 Q I'm asking you, is it scientific valid comparison?

10 A With certain limitation I talked about, but within the
11 limitation I would consider it valid.

12 Q Their comparison yields a number, not of 2.1, but of 1.2,
13 correct?

14 A Correct.

15 Q Did you ever run your model to see what numbers would be
16 coming out the back end?

17 A I could give you a rough estimate, but I have not
18 specifically done that.

19 Q If it was 1.2 as opposed to 2.1; the insulators are male?

20 A They are blue collar, they tend to have a lower
21 educational level than the general average American, right?

22 A They are high school and below.

23 Q And they are most definitely exposed to asbestos, true?

24 A Correct.

25 Q Indeed, they have been heavily exposed to asbestos?

page 6262

page 6263

1 A Correct.

2 Q Now, the ACS 2 chart that you have -- CPS 2 is a group of
3 people, male?

4 A Correct.

5 Q Blue collar?

6 A It goes beyond blue collar, but, yes.

7 Q I don't care how you want to do it?

8 A As I had explained, these are people in any one of the
9 three jobs that they reported that they were not just blue
10 collar, that they were in specific occupations like
11 insulation, working with automobile brakes, boilermakers,
12 shipyards, for at least ten years. It's just not anybody in
13 blue collar.
14 Q You believe all of those people were exposed to asbestos?
15 A No, but it is the best I could do to come close.
16 Q Best you could do?
17 A That's right.
18 Q Best you can do. Lower education?
19 A High school and below.
20 Q Let's talk a little about some of the occupations that
21 you included. Defendants Harris Exhibit 22. Some of the
22 occupations that you included in order to to get people to
23 work with asbestos; you included people who were carpenters
24 and worked with wood lumber, correct?
25 A Where is that? I think I did. If you could show me.

page 6263

page 6264

1 Q It's our understanding of what is on your computer
2 program.
3 A That looks like my codes I took the codes from the Cancer
4 Society study and I listed them and I said okay, I don't know,
5 should I put those as occupations, but I had the foreman and
6 the machinists --
7 Q Did you use the carpenter who worked with wood lumber?
8 A I would have to look at my program. My inclination would
9 be to include it.
10 Q Just focus on the question, did you or did you not use
11 that in your computer run?
12 A I have to look at it, but I hope that I did.
13 Q And the truck, bus, cab driver, delivery?
14 A I hope I did.
15 Q Did you or did you not?
16 A I would have to look at the actual program.
17 Q Farmer, farm and labor, did you include those folks?
18 A I hope not.
19 Q You hope not?
20 A No, because I think on the whole you wouldn't, you
21 wouldn't want to put the farmers in there. If I put them, I
22 don't know if they would make a difference, but I think -- any
23 kind of transportation --
24 Q I'm sorry, Dr. Harris. Did you include those people or
25 not?

page 6264

page 6265

1 A I would have to look at the program.
2 Q Did you include firemen?
3 A Yes.
4 Q You would recognize, wouldn't you, Dr. Harris, that by
5 including all of those different occupations, you may be have
6 been looking for occupations more likely to be exposed to
7 asbestos, but you picked up a lot of people who had no
8 asbestos exposure?
9 A Yes, it's possible.
10 Q Indeed it's probable?
11 A I wouldn't go that far.
12 Q You think it's more probable than not, that all the
13 people that had job occupations were all exposed to asbestos?
14 A You have 20 --
15 Q That is not my question.
16 A That is the best I can do.

17 Q You can't say it's more or less probable. Think if you
18 want to.

19 A It's the best that I can do.

20 Q That's all you can say?

21 A Yes.

22 Q The people that are insulators, there is no doubt about
23 it, you are 100 percent sure that they were exposed?

24 A Correct.

25 Q You have a group of people that you know were exposed to
page 6265

page 6266

1 asbestos, like Dr. Selikoff said, if you are exposed to
2 asbestos and you smoke cigarettes, and asbestos is dangerous
3 and smoking is dangerous, you're at risk, don't you think
4 those people are going to be more sensitive to the message
5 than the people who may be that had exposure, maybe they
6 didn't?

7 A It depends who you're going to pick up. If you're going
8 to pick up all the suburban neighborhoods of the Cancer
9 Society people, you could be picking up people that are highly
10 into health --

11 Q Highly into health. The farmer farmhand laborer is into
12 health?

13 A The people in the Cancer Society study.

14 Q The cancer picked up the farmer and farmhand, laborer
15 into health?

16 A The right way I had to put it, even when I tried to find
17 people within specific occupations, I can't get away from the
18 fact that this is not a representative group of people.

19 Q Last chance, Doctor. The message is given, asbestos and
20 smoking are bad for you especially when combined, do you think
21 the people, given the way that you set this up, do you think
22 the insulators will be more sensitive to the message than the
23 people that you put into this group from the CPS 2?

24 A You should, in principle, if you could get an exact
25 match.

page 6266

page 6267

1 Q You should what?

2 A If you could get an exact match of an insulator who got
3 the message to exactly an insulator who didn't, then you
4 should see a difference. If you are matching an insulator
5 that is close to that, you could get somebody who still has a
6 different education, you are not going to get the same person.

7 Q Maybe I wasn't asking the question clearly. You have
8 given the message asbestos and smoking is bad for the people
9 who follow the description of the insulators. Wouldn't you
10 expect they would be more responsive to the message than
11 people who were -- at most you could say is the best that they
12 could do, maybe they had asbestos exposure, wouldn't you
13 expect this group is going to react more?

14 A I don't know.

15 Q Now, if you wanted to, Dr. Harris, you could do another
16 simple run on CPS 2 and pick up the question that asks for
17 asbestos exposure, right?

18 A You mean the question that I discussed in my examination,
19 the one about asbestos from your daily life and your work, the
20 exposure.

21 Q Right. If you wanted to you could run that number,
22 correct?

23 A You could keep doing runs.

24 Q You could run the number?

25 A You could run it.

page 6267

page 6268

1 Q You could have come in here today and shown whether that
2 number was the aim or difference --

3 THE COURT: Don't ask that question.

4 Q One has question on ACS 2.

5 Q Wasn't it true when you worked with the insulators as
6 part of that study, you wanted to make sure that you had the
7 best data on whether they were current smokers or not?

8 A Correct.

9 Q Isn't true that one of the sources of data was Dr.
10 Selikoff? Dr. Selikoff had data on whether people were
11 current or former smokers as of '83?

12 A The insulators, correct.

13 Q Talking about insulators?

14 A I don't know who else had the data.

15 Q That's fine. Isn't it true there were in your original
16 testimony back a while ago, there were 110 people that you had
17 included as being current -- quitters; they had quit, but
18 Selikoff said that they were current smokers?

19 A Selikoff never said anything about it.

20 Q You used his data to determine that they were current
21 smokers, correct?

22 A Yes.

23 Q You switched those 110 people from being quitters to
24 being current smokers?

25 A I wanted to, yes.

page 6268

page 6269

1 Q And you used that when you made that switch, that's when
2 you came up with your 2.1 number, right?

3 A Yes. I had people who said that they quit within six
4 months, and I decided maybe it would be better to take those
5 people out and say they didn't quit even if they did; that was
6 at least my intention to.

7 Q From your report number 6, at page 18, you say second, by
8 way of sensitivity analysis, I reclassified 110 recently
9 quitting insulators as current smokers, in accordance with the
10 definition used by the Mount Sinai researchers in one of their
11 later papers?

12 A It was Dr. Ruth Lilles, and I tried to match my data with
13 hers, and she regarded the people that quit six months ago as
14 not necessarily quitting, so I tried to match it with hers,
15 and not count those people. At least I tried not to count
16 those people.

17 Q That would have had the effect of lowering the quit rate
18 from 2.4 to 2.1?

19 A That was not the reason I lowered it, but that was my
20 intention in this report.

21 Q Just tell us, when you did the chart that we had up here,
22 this one here, when you were doing those insulators, that 110,
23 did you count them as being current or did you switch them
24 back to being quitters?

25 A My intention was to make them current, which is to say

page 6269

page 6270

1 that the people at the very end in 1983, the end of the whole
2 thing, if they just said that they quit in June of '83, my
3 intention was to say no, we're going to keep them as smokers,
4 we won't count them.

5 Q Are you sure you went ahead and did that in connection
6 with the computer program itself?

7 A That was my intention.

8 Q You checked to make sure and see whether you did or not?
9 A I would have to look at the computer code. I would know
10 what would happen if you took them out.
11 Q What would happen?
12 A I would need the stick. Can I?
13 Q Just tell us if the quit rate would change or not?
14 A You see the hook at the bottom, those are the people that
15 quit in '83, and we say they quit yesterday, you have to get
16 the whole chart up to that, but in '83 you have to knock that
17 off.
18 If I made a computer program mistake and didn't take
19 the 110 out and make them back to smoking, then the last hook
20 at the bottom wouldn't be as big. I don't know how big it
21 would be, but it would be less.
22 Q Tell me whether your home analysis would be statistically
23 significant?
24 A The part of the steps would be the same except for the
25 last hook.

page 6270

page 6271

1 Q When we talk about statistical comparison, statisticians
2 use tests to determine statistical significance, do they not?
3 A They do.
4 Q Certainly if this curve, this difference was not
5 statistically significant, you want to tell the jury that
6 before you have testified about the reasons, wouldn't you?
7 A Yes, I would.
8 (Continued on next page.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

page 6271

page 6272

1 CROSS EXAMINATION (Cont'd.)
2 BY MR. BERNICK:
3 Q You have start date and you have quit date, and isn't it
4 true that in your model the medical data if it passes the
5 protocol is usable for the start date and the medical data, if
6 it passed the protocol is usable for the quit date?
7 A Not exactly.
8 Q Well, you tell me under your model isn't it true that
9 quit date is determined from the medical data if the protocol
10 finds out according to the protocol that start and stop are
11 included in the medical information?
12 A The medical auditors went back and they tried to look for
13 spells in which they had the very, very beginning of the time
14 smoking and the very end of the time smoking pinned down. But
15 as in the case I showed to the jury, that person with lung
16 cancer, they didn't have the date of the smoking start pinned

17 down. They clearly had the date he was still smoking pinned
18 down. So they would not have put that one in the protocol.
19 Q I understand that but if they in the protocol they used
20 medical date for start and medical data for quit?
21 A If the auditors could put that in they would have that.
22 Q I would like to just focus on my question. Both of my
23 questions were focussed on the people where medical data
24 clears the protocol. I use medical data for start and medical
25 data for quit?

page 6272

page 6273

1 A Correct.
2 Q Now, the POC, the proof of claim, you will use for start
3 but you will not use the POC for quit, correct?
4 A Correct.
5 Q And the reason you don't use POC for quit is you feel it
6 is your judgment that when people fill out the POC forms they
7 may not fill them out reliably when it comes to whether they
8 quit smoking?
9 A You got it.
10 Q Which basically means, let's be candid about it, you are
11 assuming that when these people are filing the claim they are
12 misrepresenting the facts?
13 A I don't think I would go that far. I don't think the
14 wife of a husband that was dead is guessing when they quit
15 smoking, that she was necessarily misrepresenting. She is
16 doing the best she can.
17 Q So she wouldn't know whether he is quit or not. Let me
18 understand, you can count on her, the wife, for information
19 about dad when it comes to the start date but can't count on
20 the wife for information when it comes to the quit date about
21 dad?
22 A I don't want to accuse any people lying on a form but the
23 fact is I looked at a gazzillion forms not just in this case
24 but in all sorts of claims for compensation, people shaded --
25 I didn't smoke, I am not smoking, I am cutting down and they

page 6273

page 6274

1 said it.
2 Q You don't want to say lie but you are, in fact, assuming
3 by not using that not -- using that quit date that they were
4 not accurately representing the facts, true or not?
5 A They were not accurately representing the fact.
6 Q When they wanted to get the PFT tests -- you know PFT
7 tests were required for some of the claims?
8 A Pulmonary function test.
9 Q Dr. Mendelsohn testified there is no problem with PFTs.
10 I know they may not go (indicating) and get it all the way
11 out, they may not go hard enough is one of the problems?
12 A Correct.
13 Q That is what they do. Okay.
14 Now, when someone is going in to make their claim and
15 they know the PFT test is a good one for claims if it is low,
16 don't you have a problem with people misrepresenting their
17 effort, saying, okay, Doc, I will take the test but they do
18 it, they don't blow it all out, isn't that the problem?
19 A Well, I think people have an lot more common sense about
20 how to answer a smoking question as to their advantage than
21 they do know how to blow into a pipe to their advantage.
22 Q Are you serious about that? They go to their lawyers and
23 they are told you are going to take the test. If your PFT is
24 less than 80 percent you get more money and they are not going
25 to go into the doctor and not think about, gee, maybe if I

page 6274

page 6275

1 blow a little less hard?

2 A They could try I guess.

3 Q Certainly they could try.

4 Well, if you can't count on them to fill out the form
5 right whether they were smokers or not, how can you count on
6 them to go to the doctor's office and blow it all out?

7 A I guess what you are talking about is if you look as
8 these PFTs it will say right on the bottom line don't --
9 according to the standards: Patient maximal effort obtained.
10 If the patient's maximal effort wasn't obtained, then they
11 count it as it doesn't count. Same thing when they do the
12 exercise test -- stress test.

13 Q Were you is your?

14 A I am telling you my medical experience.

15 Q Okay. So then tell me are there are other tests or other
16 information on those POC forms that you can also consider to
17 be unreliable or is it just that quit rate?

18 A Well, each one of the pieces of information has to be
19 subject to confirmation. I can't walk in and say that I laid
20 sheetrock and bales of hay without proving it like a cancelled
21 pace for my employer.

22 Q Are you sure? What about when it comes to how long have
23 you been exposed to asbestos and there is a requirement under
24 TDP of duration of exposure for asbestos sometimes 15 years?

25 A That's correct.

page 6275

page 6276

1 Q Do you know whether the Trust ever sought to verify any
2 of those 15 year periods?

3 A I don't think I am the expert on that but I can tell you
4 in reading well over a couple of hundred of these forms in
5 there is the letter that you worked for shipyard for the tire
6 maker -- right in there.

7 Q Dr. Harris, when it came down to paying the money the
8 Trust used the proof of claim?

9 A And the proof of claim is not just a piece of paper that
10 the person fills out. It's all the stuff. They got to
11 document it.

12 Q Are you sure they use all of that?

13 A In terms of the medical, I know for a fact you just can't
14 say you got asbestosis. You've got to show the X ray.

15 MR. BERNICK: I am not talking about the medical.

16 MR. STENGL: If Mr. Bernick is not talking about the
17 medical. He is probably far afield on the scope.

18 Q Not at all. I'd like to get the answer to the question:
19 When they said 15 years of exposure to asbestos was there any
20 way that somebody got back there and verified they were out
21 working first with asbestos for 15 years, do you know?

22 A I do have information about that. I am not an expert. I
23 saw on every one of these forms people would have lists of --
24 they are like your social security earnings, list of their
25 employment. I can't tell you what the Trust did with it. I

page 6276

page 6277

1 have not gotten into it.

2 Q Did H.R.A. litigation auditors audit for that?

3 A HRA auditors?

4 Q Did they audit for that?

5 A I don't know.

6 Q I got sidetracked. I have to say Mr. Stengl is right.

7 A That's all right.

8 Q We have 1,090 people -- 1,090 people where the protocol,
9 the medical data, didn't pass the protocol. Right out of your
10 sample of 3500 or thereabouts you had about 1,090 people whose
11 medical data didn't pass the protocol?

12 A The medical data -- the summary medical data had a spot
13 rather than a number for 1,090 cases but that does not mean
14 there was no medical information.

15 Q I am sorry, Dr. Harris. We are never going to get out of
16 here. My question was were there 1,090 people whose medical
17 data didn't pass the protocol, yes or no?

18 A That's right. They had a dot for those spots. They said
19 they had a dot for those spots.

20 Q For those 1090 people you used a proof of claim for
21 starters, right?

22 A When I could.

23 Q And in fact, you used it for all 1,090 people?

24 A No. A lot of people, there was no date of starting no
25 matter how you looked at it but the typical person in this

page 6277

page 6278

1 generation started about age 20, so I put the 20 in there.

2 Q Did you impute some start dates?

3 A Yes.

4 Q So the start date was not even there but you said here is
5 what I think it is?

6 A Well, if they are born in 1925.

7 Q Did you impute some of the start dates?

8 A Yes.

9 Q In 1090?

10 A Yes.

11 Q With respect to all people -- 1,090 -- you had them
12 starting but even though the proof of claim form says they
13 quit, you assumed that they continued smoking for purposes of
14 your analysis, correct?

15 A Correct.

16 Q 1,090 people. In fact, I got a list of them all here.
17 There are a lot of different people, all of whom followed the
18 description we just talked about?

19 A Correct.

20 Q Isn't it true out of a sample of 3500 people, 1090 is
21 pretty darned significant in the statistical sense?

22 A It is almost a third, yes.

23 Q Now, let's talk a little bit about what you have done
24 with respect to those 1,090 people.

25 You told us a year ago that you were looking at

page 6278

page 6279

1 medical records, right?

2 A Right.

3 Q You told us, well, a year ago I started looking at those
4 medical records, right?

5 A Yes, I did. The answer is yes.

6 Q And you talked to the Trust to find out. The Trust kind
7 of agreed that the proof of claim here might not be that
8 accurate.

9 Do you remember saying that?

10 A Not only kind of agreed, they said throw it out.

11 Q Trust didn't want to have any part of that?

12 A On the smoking part of it, yes.

13 Q On the smoking part they said throw it and that was
14 consistent with your views, right?

15 A Yes. I mean I took a look at the records and I did kind
16 of look at it.

17 Q Look at it?
18 A I did. I looked at the records.
19 Q You just looked at that. That is what I am going to get
20 you to look at but you didn't do any statistical analysis --
21 another one of those visual impressions that you had, right?
22 A At that time before I did any analysis at all, you are
23 right. I looked at the medical records and I formed my
24 judgment and I used my common sense. I did not do a
25 statistical analysis of any kind at that time.

page 6279

page 6280

1 Q Was that judgment or a visual impression?
2 A That was a judgment.
3 Q Did you talk to the litigation auditors, to HRA people to
4 find out whether that comported with their impression or
5 judgment?
6 A Yes. In fact, they told me that was part of the rules of
7 the audit.
8 Q Rules of the audit. So that the Trust is telling you to
9 throw them out. The HRA people are telling you to throw them
10 out, right?
11 A Well. They said that the way they ran the audit if they
12 were satisfied they had an absolute start and stop date from
13 the medical only. They weren't even going to write down the
14 thing from the proof of claim.
15 Q They are just going to use the medical data, correct?
16 A Correct.
17 Q Now, you didn't do any statistical analysis at that time,
18 did you?
19 A No, that was before I did any computer runs.
20 Q And in June you learned that Dr. Wecker said, gee,
21 Dr. Harris is wrong with those proofs of claims, right?
22 A In June 15 Dr. Wecker's report did include a criticism of
23 my interpretation of the computer codes that you are talking
24 about here.
25 Q And in fact, you didn't do any statistical analysis to

page 6280

page 6281

1 respond to Dr. Wecker's statement in June, did you?
2 A No.
3 Q And you didn't do any sampling analysis to respond to
4 Dr. Wecker's statement in June, did you?
5 A I kept reading the records all along.
6 Q And when you testified before this jury in December isn't
7 it true that you said you just didn't know that medical data
8 was captured, how that medical data was captured or not?
9 A In response to one question did you ask me something
10 about its and I said I don't know, I remember that, yeah.
11 Q I asked you more than one question 2774. I said after
12 giving one of those claims I said even where the medical
13 records reflect that a smoker has quit 15 years ago under the
14 procedures that were followed for purposes of this audit that
15 you have talked about, this information was not used for your
16 model and your answer was I don't know.
17 A Oh, well, that is for that one insulator you showed me. I
18 couldn't tell you off the bat what the insulator's answer was
19 for that one.
20 Q Yes. You don't know:
21 Answer: I know this is statement that if, indeed, it
22 is a medical record, then the principles according to the
23 audit would be taken into account but as to who this
24 particular person is and what the numbers show for that person
25 I don't know.

page 6281

page 6282

1 A Yeah. That guy, he was one of those insulators in that
2 chart and I couldn't tell you what my program did for that.

3 Q You couldn't do that?

4 A No.

5 Q I asked you further:

6 Isn't it true that this kind of information wouldn't
7 be used?

8 Answer; I don't know the answer to that.

9 You couldn't even tell us whether the protocol --
10 whether the protocol would pick up that kind of information or
11 not, right?

12 A The protocol had some details in it about what the
13 auditors were going to do when they had questions like he
14 smoked for 30 pack years that I had to go back and check.

15 I interpreted your question as to whether it was
16 about that. Maybe you showed me. I didn't know what.

17 Q When you came in to testify here in December you didn't
18 really know the details of that protocol, did you?

19 A I didn't know absolutely every detail.

20 Q You didn't flow the details of the HRA audit, did you?

21 A I knew a lot of the details. I think there are a few
22 that I didn't get exactly right having to do to, for example,
23 with the year stopped and the date of diagnosis.

24 Q I am talking about who it is that ran the audit, whether
25 it was run for litigation purposes, you didn't know whether it

page 6282

page 6283

1 was run for litigation purposes?

2 A No, I didn't know that.

3 Q Did you find out the answer to that, did you confirm
4 that, in fact, that audit was run for litigation purposes?

5 A I didn't ask.

6 Q Didn't ask that even before you came into testify here
7 again, you didn't take the time to find out the answer to that
8 question?

9 A No.

10 Q Okay.

11 Now, today, after having gone through this for the
12 better part of a year, I think you testified that you came up
13 with two claim forms, right?

14 A Correct.

15 Q And isn't it true of those two claim forms that you
16 picked, out only one of them comes out of that group of 1,090;
17 true or not?

18 A Right. The other one comes out of a different group,
19 correct.

20 Q That all the verification that you produced for us here
21 today, this time that you are testifying, this time that you
22 are testifying, that is all the verification you produced here
23 today about who is in that 1,090 is that one claim form,
24 right?

25 A That's correct.

page 6283

page 6284

1 Q Okay. Now, I have got a few more examples for you to
2 take a look at here and --

3 MR. BERNICK: We can mark them all essentially Harris
4 Exhibits 23 A, B, C.

5 THE COURT: That's good.

6 Q I want to show you proof of claim 7577.

7 I ask you whether as you look through all those many,

8 many claim forms, you look at them. One, I represent to you
9 every single claim form I am going to show you comes out of
10 that group of 1,090?
11 A Well, it takes me about 20 minutes a form. I don't know
12 what to do here.
13 Q Why don't you look at the tabs I've got marked for you?
14 A Well, I think to do it right -- I don't want to -- I
15 should look at the whole thing.
16 Q After reading all the claim forms do you even recognize
17 that one?
18 A I don't know.
19 Q Why don't you turn --
20 A There were so many.
21 Q Turn to the first tab and tell me whether the proof of
22 claim says they quit in 1976?
23 A Yes, it does.
24 Q So according to proof of claim form, they quit several
25 years ago?

page 6284

page 6285

1 A Correct.
2 Q Why don't you take a look at whether the medical data
3 says that they are former smoker?
4 THE COURT: I did not hear.
5 MR. BERNICK: Whether the medical data says they are a
6 former smoker.
7 THE COURT: Thank you.
8 Q I think I marked both points, Dr. Harris.
9 A Well, I don't know what to do. I read these things with
10 a fine tooth comb.
11 You are absolutely right that the point you make says
12 he is a former smoker from his medical record but I will tell
13 you sometimes in the pulmonary function test, sometimes in the
14 X ray report there is also information.
15 Q Well, if we believe what he said when he talked to his
16 doctor and if we believe what he said when he talked about how
17 filled out the proof of claim, he was saying the same thing
18 which is I'm an quitter, right?
19 A Well, he doesn't say when he quit. He doesn't say quit
20 six years ago to his doctor.
21 Q Does he say I'm a quitter?
22 A He says he's a former smoker. That's the best I can do.
23 Q And he would have been a continuing smoker under your
24 analysis, correct?
25 A Yes. I would have him smoke to the date of his diagnosis

page 6285

page 6286

1 and I can't tell you, I think it probably would have been
2 around 1982. So I would have had him stopping smoking in '82,
3 rather than '76.
4 Q Why don't you take a look at this one. That's 23B.
5 Again, look at the tabs. You will move through it real
6 quickly. It's got the dates there.
7 A The insurance form, I am sure. The claim form it says
8 quit in 1973. Hold on. His date alleged first diagnoses was
9 1978. Don't know if that is correct. That's when he alleged
10 it.
11 Q Why don't you take a look at the tab. It will go much
12 more quickly.
13 THE COURT: Let the Doctor go through the file if he
14 wishes.
15 MR. BERNICK: Okay.
16 THE WITNESS: Okay.

17 A I usually spend a lot more time with these things but I
18 feel like I should (perusing) --
19 Q Did you get to the second tab yet?
20 A No, I am still looking at the death certificate. Well,
21 the highlighted line by the doctor in a letter dated-- well --
22 I don't know what the date of the letter is. Probably after
23 1977 said that he stopped smoking cigarettes in 1973, four
24 years prior to his onset of lung cancer.

25 Q If that statement is correct, the proof of claim would be
page 6286

page 6287

1 completely lined up with the medical data?
2 A Yes, it would.
3 Q And again, under those and yet this is a person according
4 to the model who was still smoking, right?
5 A I would have him smoking until '77 under the model.
6 That's correct.
7 Q And we will just do one more in the interest of time. I
8 have a whole stack. If you want to look at the rest we can do
9 that. 23C, I will make it a little bit faster. Do you see
10 the proof of claim has member quitting 1972 and the medical
11 report dated 1981 says he stopped in 1973.

12 A Oh, my God, he committed suicide.

13 Q Well, I am sure that is unfortunate but --

14 A I am sorry.

15 Q '72, '73.

16 A Looks like his wife said he quit smoking in 1972.

17 Q That again would be another example of consistency
18 between the proof of claim and the medical form. Was that
19 another example where according to the model that person was
20 still smoking?

21 A Hold on a second. I got to get over that. It said that
22 he stopped smoking in approximately 1973 and looks like a
23 workup that he had after they discovered the lung cancer and
24 they were going to decide whether to do chemotherapy. Wait a
25 second.

page 6287

page 6288

1 So what's the problem?

2 Q The problem is your model says he's still smoking?

3 A He would smoke until -- it depends on when the coders
4 coded date of diagnosis. If they coded the date of diagnosis
5 as '73, then I have him stopping in '73 and the POC would have
6 him stopping in '72.

7 Q According to your model they are not included because
8 they are part of the 1,090?

9 A No. All of those are in my model. These are the ones
10 that Dr. Wecker considered.

11 Q They are all counted as being people who have quit?

12 A No.

13 Q People who have continued to smoke?

14 A Up to the date of their diagnosis which in this case is
15 --

16 Q Okay. Fair.

17 A 70 --

18 Q You are sure that your model does that?

19 A Yes -- no. But yes, that was the intention. But I don't
20 understand. I think this is --

21 Q Not the intention. Do you know that your model on the
22 basis of medical information -- the medical let me just be
23 clear, under your model for the 1,090 the medical data column
24 has got a dot?

25 A If this had a dot, then I would have this person

page 6288

page 6289

1 continuing to smoke up until the year of his diagnosis. Now
2 if that is a review of this '72 I had him smoking up to '72
3 and the POC had him smoking up to ' 72. If the date of
4 diagnosis was '73 and I am not sure I have to go back over
5 this, it would be '72 versus '73.
6 Q This is an example of a case, Dr. Harris, where this is a
7 person who told his doctor that he quit in '73, and this is a
8 person who when he filled out that proof of claim was reliable
9 in stating what the quit date was, correct or not?
10 A Oh, that would match, yes. And from what I could tell in
11 this record, I mean you are off by a year difference. The
12 other one, you are off by four. So I don't think in these two
13 cases they are that far off.
14 Q That's my whole point. In these cases -- indeed, all the
15 cases that I have got here, the proof of claim quit date is
16 very consistent with what's in the medical records. You have
17 not done the statistical analysis that says otherwise prior to
18 the time that you testified in your first appearance?
19 A Prior to that time, that's correct.
20 Q Okay. Now, I have one more question before I let you
21 go. You showed numbers here that are before the jury now as
22 being the claim in this case and the representation has been
23 made to the Court and to us that these are the damage numbers
24 that the Trust is going to be seeking in this case.
25 Dr. Harris, are you with me?

page 6289

page 6290

1 A Yes.
2 Q I want to ask you one last question and then I'll sit
3 down. Isn't it a fact that the only way to come up with these
4 numbers, the only way to come up with these damage numbers is
5 through your hypothetical statistical count -- first factual
6 model?
7 A Correct. I produced these numbers. Without my
8 calculations the numbers wouldn't be there.
9 Q Wouldn't be there?
10 A Correct.
11 MR. BERNICK: That is all I've got.
12 THE COURT: You don't have any redirect?
13 MR. STENGL: I think not, Your Honor.
14 THE COURT: Do you?
15 MR. STENGL: No.
16 THE COURT: I didn't thing you did.
17 Thank you.
18 Call the next witness.
19 MR. BERNICK: We would like to call Dr. Wecker to the
20 stand. If you would give me half a second to gather my
21 papers.
22 THE COURT: Would you like to take a stretch for a
23 half second? Stretch, ladies and gentlemen. Thank you.
24 They will take a half second stretch.
25 (Jury out.)

page 6290

page 6291

1 MR. STENGL: Just one issue and I don't know how this
2 is going to play out. Obviously, Dr. Harris followed your
3 ruling no new computer programs. I received after midnight
4 last night page after page of computer material which was
5 represented as pertaining to Dr. Wecker. I am frankly not
6 certain at the moment there is a reason for a surrebuttal
7 witness at all.

8 THE COURT: Well, I'll put him on. Did he make any
9 new runs?
10 MR. BERNICK: We learned yesterday morning exactly
11 what the Doctor was going to say. You bet this doctor did new
12 runs. These are all new runs that came in after he was on the
13 stand. We deposed him yesterday morning. This whole thing
14 was completely over our objection and he now made statements
15 that impute the integrity of my expert. Now, these new runs
16 to Dr. Harris would be very, very easy to --
17 THE COURT: Let's hear what the witness has to say.
18 MR. STENGL: As a point of protocol I got this after
19 midnight. Dr. Harris has been otherwise engaged today. I am
20 not sure when we were supposed to have the leisure to analyze
21 what appears to a simple minded lawyer as not
22 self-explanatory.
23 THE COURT: Take him out to dinner, come in tomorrow
24 if you think you need him. I doubt if I will let you put him
25 on.

page 6291

page 6292

1 MR. STENGL: My concern was more my ability to cross
2 Dr. Wecker. I have no intention of bringing Dr. Harris back.
3 I am sure he wouldn't if we were to ask him politely.
4 THE COURT: Let's see what happens. Anyway Harris''
5 document comes in.
6 Harris 1, 2, 3, 4 and 5. Defendant Harris 22,
7 defendant Harris 23A, 23B and 23C are all in evidence.
8 (Harris 1, 2, 3, 4 and 5. Defendant Harris 22, 23A,
9 23B, and 23C received and marked into evidence.)
10 Okay.
11 (Court recessed.)
12 (Court resumed.)
13 (The following took place in the presence of the
14 jury.)

15 THE COURT: Go ahead, please.
16 You are still under oath Doctor
17 W I L L I A M W E C K E R ,
18 resumed the stand and testified further as follows:
19 DIRECT EXAMINATION
20 BY MR. BERNICK:
21 Q We are going to go one, two, three and be done here.
22 First of all, with respect to the comparison between the
23 insulators and CPS 2, Dr. Harris showed a chart called
24 Plaintiff's Exhibit 11 which is also shown to you on our cross
25 examination.

page 6292

page 6293

1 Do you recall that?
2 A Yes.
3 Q And he told us that in developing that chart the
4 insulators were male, blue collar education, exposed to
5 asbestos and CPS 2 people were male blue collar with some
6 special selection of occupations as the plus factor, high
7 school and below and best he could do on asbestos exposure
8 which was the occupation.
9 Is this a valid comparison between the insulators and
10 CPS 2, yes or no?
11 A I think you can do better.
12 Dr. Harris is correct that when trying to make a
13 comparison to insulators it is not so easy because the CPS 2
14 people are generally different kind of folks, but I think he
15 could have gone a step further here and if you want to ask I
16 will pursue that.

17 Q Sure.

18 In particular he made mention of the fact in your
19 analysis had included a bunch of people who were from what
20 were, more or less, white collar occupations.

21 Do you recall that?

22 A Yes.

23 Q And he then talked about the chart that you had done
24 after the lunch hour, which was Wecker 28 where you showed
25 that once you control for all the variables there is no

page 6293

page 6294

1 difference between the insulator, the comparison group
2 insulator.

3 Do you recall that?

4 A Yes.

5 Q What is it that this chart did, if anything, that
6 Dr. Harris has not done in his own comparison?

7 A That one included to asbestos variable, so I was looking
8 at just the people said these asbestos exposure.

9 Q And more generally asbestos, what is the important thing
10 that should be done in making the comparison?

11 A Dr. Harris started with a better comparison and there is
12 one more thing that is important and that is the difference
13 before Dr. Selikoff comes along.

14 Q Tell the jury about this.

15 A If the two groups are already different before
16 Dr. Selikoff you want to look at an extra difference and
17 increase over what was there before and generally in these --
18 I think every comparison I have looked at that's an issue,
19 when you come to Dr. Selikoff's time in 1963 you don't want to
20 just look to see if there is a difference, you want to see if
21 it is any different than it used to be.

22 Q Does his comparison here do that?

23 A No.

24 Q Tell the jury why it is that Dr. Harrison's comparison
25 not only doesn't take account of the exposure question, but

page 6294

page 6295

1 also, doesn't take account of the pre-1962?

2 A Well, he just doesn't choose to.

3 Q Have you done an analysis? Have you done a comparison
4 that not only takes into account asbestos exposure, but also,
5 takes into account pre-1962?

6 A Yes.

7 Q What have you found?

8 A No statistically significant difference. I have done it
9 in a variety of ways, I always get the same answer: No
10 significant difference.

11 Q If we line up the asbestos workers, the insulators, male
12 blue collar, lower education, asbestos exposure and we line
13 them up as absolutely best we can with CPS 2 male blue collar
14 lower education and asbestos exposure, and we control to see
15 post '63 as well as pre '63, are you aware of any computer
16 analysis that shows a statistically significant difference
17 between those two groups?

18 A No. Every one I have seen shows no difference.

19 Q Let's take a look at the next thing which was the
20 rounding.

21 These showed Wecker Exhibit 15.

22 And first of all, let me just ask with respect to
23 rounding, does rounding necessarily mean that the people quit
24 later than what's indicated or earlier than what is
25 indicated? Does it have a bias one way or the other?

page 6295

page 6296

1 A No. There is -- it can work either way. If you quit, if
2 you say that you quit 20 years ago or 40 years ago, it could
3 mean '41 or '39. There is no reason to think it always goes
4 one way.

5 Q Even if you took out those peaks here, the earlier years,
6 would there would or would there not be still a difference
7 between the insulators or the claimants prior to 1962?

8 A Yes, you can see it and this is the chart to see it. The
9 circles, which are the quit rate of the claims in accordance
10 with the way I have criticized Dr. Harris has calculated, they
11 are all below there, maybe with one exception way in '45 I
12 think but they are all below even without those peaks.

13 Q Dr. Harris expresses a difference between the insulators
14 and the claimants two point one two one after 9/10/63.

15 What is the ratio before?

16 A About the -- it is the same, about two to one. It is
17 easy to see just looking at the circle and then go double and
18 you find a triangle.

19 Q Now, Dr. Harris says I assume that the difference was
20 zero prior to 1963 given this data; is that a reasonable
21 assumption?

22 A No, it is not reasonable. The difference plainly on the
23 chart is about a fact or two and this fact or two and there is
24 no way in the world you can explain that difference.

25 Q He also said he did not do any statistical analysis.

page 6296

page 6297

1 Have you done a statistical analysis to see what the effect is
2 of taking different periods of time prior to the rounding or
3 he says the rounding?

4 A Yes.

5 Q And what have you found?

6 A One thing I looked at was the period 1950 to 1960 because
7 with this rounding, rounding is real. It is just not big
8 enough to explain what we see here but if rounding is going to
9 have any effect of importance here it is going to be around
10 19623, '63 where some of the people could by rounding get
11 shuffled back and forth across that important period of time
12 starting in 1963. So I just left that aside. Went back to
13 1950 and 1960.

14 Q Harris' number is 2.1?

15 A Right.

16 Q We are now talking purely about pre-1962 where he says --
17 Harris says zero. What have you found pre 1962 and let's
18 begin with what he saw through '55?

19 A 1950 to 1960.

20 Q 1950 to 1960 is the number zero or something else?

21 A It is 2.48.

22 Q What is the next comparison you did?

23 A I went back and looked at 1950 to 1955.

24 Q Did you do another one or is this it?

25 A This is it.

page 6297

page 6298

1 Q What did you find from 1950 to 1955?

2 A Two point three eight at that time.

3 So I believe, roughly, double the triangles are twice
4 as high as the circles that you can see easily on the chart
5 has been present throughout from the beginning of this chart
6 all the way to the end of the chart.

7 Q Now, Dr. Harris was very candid in saying my analysis --

8 my -- Dr. Harris' analysis must show a jump from 1962 for the
9 theory to be right.

10 When you look prior to 19628 even when you took into
11 account rounding did you find that the difference was zero or
12 something more than zero?

13 A The difference is substantially about the same after
14 1962.

15 Q You had two point four eight, two point three eight.
16 Tell me, Dr. Wecker, when it comes to that question was there
17 a jump beginning in 1962?

18 Do you find any evidence of a jump in 1962 even
19 considering rounding?

20 A No, there is no jump.

21 Q Last point which is the POC. Let's begin with some of
22 those samples. I think that this was shown to the jury. I
23 think both of these were shown to the jury. Did you have some
24 comment with respect to one of the files that was shown?

25 A Well, one comment is that only one of them comes from the
page 6298

page 6299

1 group -- that is, the one I'm pointing to as the group-- that
2 is causing the problem and the artificial difference between
3 the claimant and the insulator, only one of the two.

4 Q Have you made your own review of the files 1,092 to show
5 whether these show evidence that there is some inconsistency
6 -- some inconsistency between the medical data and proof of
7 claim?

8 A I have done two things. One was to look at the files
9 such as the ones you have on your arm there, and when I look
10 almost every time I find consistency. And the other thing is
11 that I previously had done that -- described it last week
12 where I looked through with the computer where you can do
13 thousands of them and they don't take so long and there I
14 found the typical case is that the two sources of information
15 match to the year. Sometimes there are some odd cases that
16 are high, sometimes low but they are in the minority and there
17 is no bias, there is no tendency for the POC to either
18 understate or overstate.

19 Q You are a statistician. Is there is a right way to go
20 about making a statistical statement -- to sift through the --
21 go through pile, through files or is there a right way to do
22 statistical analysis?

23 A Some statistics analysis could be done, I suppose, by
24 going through files but you want to be systematic about it and
25 with this amount of filing and finite lifetime it is better to

page 6299

page 6300

1 use the computer method.

2 Q If you use a computer method to determine is there a
3 significant difference between proof of claim form, medical
4 data, what conclusion did you reach?

5 A I don't find any bias at all.

6 Q Is that consistent or inconsistent with the presentation
7 you made during your direct examination on whether the
8 insulators had a quit rate as compared to claimants'?

9 A It is consistent with it and it is one of the points I
10 made last week.

11 Q Now, let me ask you something that is a little bit more
12 general along the same lines. If we take with respect to the
13 insulators and determine ratio of the total amount of people
14 who quit versus smokers, about what number would you come up
15 with?

16 A You want to restrict that to 1963 to 1983 time date which

17 is the period we have been talking about all along, so that
18 has to be understood. If you look at the people who quit in
19 that time period, the insulators I think are 46 percent. Let
20 me double-check that. I think it is 46 percent.

21 Q Now, we want to talk about the claimants. The first
22 thing we are going to talk about is the claimants who medical
23 start and stop.

24 As they got the medical data, about what is the ratio
25 of this approximately?

page 6300

page 6301

1 A That's 43 percent.

2 Q If we now take the 1,090, that is the 1,090 who have POC
3 starting/stop but no medical according to the protocol, what
4 is their comparison?

5 A Now, here we are at a fork in the road. It depends on
6 how you count. If you do it the way Dr. Harris did, it is
7 zero percent.

8 Q What is the answer based on if the data -- if you take a
9 look at the quitting according to the POC? You have got the
10 POC, what is the --

11 A Don't ignore it.

12 Q Don't ignore anybody?

13 A If you use it all it is 45.

14 Q If you have a last category that was without POC, without
15 medical start and stop?

16 A Yes, there is a 193 extra that I didn't talk about last
17 time. We had nothing.

18 Q Those you have to count as what? What would be the ratio?

19 A I would ignore those because there is nothing to work
20 with.

21 Q So we have the insulators as 46 percent. That is what we
22 are comparing everybody to?

23 A Yes.

24 Q If you go to the claimants that got the medical data you
25 got 43. If you go to the people who have POC start and stop

page 6301

page 6302

1 you have got 45. Is there any significant difference between
2 the quitting ratios of any of these three groups?

3 A No, they are all essentially the same.

4 Q Now, this is what you were getting to. In order to do
5 his analysis what does Dr. Harris do with those 1,090 people?

6 A He says every one of them never quit in period and so he
7 have a zero percent, exactly zero. Not anything more. Just
8 zero.

9 Q And because he takes them down to zero what does that
10 do? If you combine -- when he takes these out there what does
11 that do to his ratio?

12 A Can I ask you to use your red pen? I can't get his ratio
13 until you put a zero on the 193 because I guess ahead and call
14 those people starters and never quitters. I computed some. So
15 those are in there, too. So if you take those two zeros in
16 red and you average them in with the blue 43. Compare that to
17 46, that is how you get 2.1.

18 Q So this will end up being about what, 22 percent?

19 A When you really do it you do it in a more sophisticated
20 way but that is roughly it. It ends up to be about half the
21 46. About 22 percent.

22 Q Because now this goes from 43 and 45 down to 22. Is this
23 how Harris gets his 2.1 quitting?

24 A That's correct. It arises because of the zeros. He puts
25 in for the one as bottom.

page 6302

page 6303

1 Q You say Dr. Harris. I am sorry but I want you to
2 consider the proof of claim data. I want you to count these
3 people not as zero but as 45 percent. What happens to the
4 that 2.1 times quit rate?

5 A That is that 1.03 that I described last week when I was
6 here.

7 Q This 1.03 and tell us whether that is statistically
8 significant or not?

9 A It is not.

10 Q Last question. With respect to the numbers in the case,
11 the Consumer Protection Act Claim, the jury is going to --
12 Dr. Harris testified that in this analysis he worked assuming
13 that the Defendants' misconduct was confined to the period
14 after 1980. Are you with me?

15 A Yes.

16 Q If we actually go to the Harris model is the Harris model
17 driven by -- when it comes to the number, is it driven by
18 conduct or is it driven by smoking decision?

19 A It is smoking decisions. Is it those numbers, the higher
20 and lower quit rates and initiation.

21 Q Is there any way to take the Harris model and say I am
22 going to pinpoint now the effect of conduct after 1980 or is
23 it instead of what is going on he is looking to the effect of
24 smoking decisions after 1980?

25 A No. There is no way to parse out the conduct part and I

page 6303

page 6304

1 am familiar with this calculation that you are displaying here
2 and it doesn't do. Here it is just smoking decisions, not
3 conduct.

4 Q And finally, the jury is going to be told about focussing
5 on conduct after 1980 in the State of New York. Is the State
6 of New York or conduct in the State of New York or smoking
7 decisions in the State of New York, is that anywhere to be
8 found in the model?

9 A No. Nothing New York specifically.

10 MR. BERNICK: That is all I have here, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. STENGL:

13 Q Hello, again, Dr. Wecker.

14 A Hello.

15 Q Now, counsel was kind enough to fax me last night this
16 which I won't mark as an exhibit but I presume this is
17 William B. Wecker & Associates work product?

18 A I can't see that.

19 MR. STENGL: May I approach, Your Honor? ?

20 THE COURT: Sure.

21 (Mr. Stengl handing to the witness.)

22 A Yes. That is my work.

23 Q That is your work and I am say frankly, Doctor, you look
24 -- have they been keeping you up?

25 A It's a long way to California.

page 6304

page 6305

1 Q But seriously you have done a lot of work since you were
2 last in that chair, correct?

3 A Most of it travelling back and forth but I have done some
4 additional work.

5 Q People working at your direction have done a lot of work?

6 A Yes, I have done that.

7 Q People wrote new code?

8 A Not much. Those are -- there are only about three lines
9 of code in there that changed Dr. Harris' code.

10 Q So you did work, people wrote some new code, albeit not
11 much. You came in here and you offered your testimony.

12 Now, let's focus on some of the concrete things that
13 we talked about earlier with Dr. Harris.

14 Now, Dr. Harris showed two files -- proof of claim an
15 medical records, you saw that?

16 A Yes.

17 Q How many medical records have you read in this case,
18 Doctor?

19 A Have I read, oh, probably less than 100.

20 Q And you relied on other people to do -- well, let me ask
21 you a question.

22 While we are talking about the proof of claim file
23 Dr. Mendelshon testified after you did - you know who
24 Dr. Mendelshon is?

25 A Actually I saw a lady coming out. I saw a lady when I
page 6305

page 6306

1 walked out. I assume that was Dr. Mendelshon.

2 Q Well, you told us that you excluded everybody with a high
3 or low ILO score of one zero or below. You said you were a
4 calculator?

5 A Yes, I remember. Last week. I think that's right. I
6 have forgotten it.

7 Q Now, were you aware that another defense expert
8 Dr. Mendelshon who we disagree with mightily on most scores
9 found a whole collection of claimants with scores of one zero
10 or lower and she diagnosed them as having disease, meaning
11 they should be paid.

12 Are you aware of that?

13 A No.

14 MR. BERNICK: Number one, they objected to our
15 presenting Dr. Mendelshon's numbers through Dr. Wecker the
16 first time that he was on the stand. They objected to it. We
17 have two analyses. One included the output of Dr. Mendelshon.
18 They objected to it, otherwise we would have but they put it
19 in with whatever Dr. Mendelshon said. That's number one.

20 Number two, it is beyond the scope of my cross
21 examination. We would be more than happy to present through
22 Dr. Wecker the real analysis that was done about Dr.
23 Mendelshon's data but that is beyond the scope.

24 MR. STENGL: Well, Your Honor, it actually isn't.

25 THE COURT: Well, ask another question. I am

page 6306

page 6307

1 sustaining that objection.

2 Q Dr. Wecker, I didn't want to be accused of cherry picking
3 medical files, so what I have pulled are some of the files
4 that Dr. Mendelshon reviewed and she had and 74 files and I
5 don't precisely remember her testimony, I don't think they are
6 randomly selected either, but I went through?

7 MR. SCHROEDER: She did testify they were randomly
8 selected.

9 MR. STENGL: I apologize. That was not my
10 impression.

11 Q You didn't use her work-product, excluded as Mr. Bernick
12 points out and unfortunately, these are not redacted, so they
13 -- so the names of the claimants but maybe we can get by
14 that. I'll just see if we can do this. Wecker rebuttal 3?

15 THE COURT: Do not show any of the names. Do not show
16 any of the names.

17 MR. STENGL: We are in luck. Dr. Wecker is Wecker
18 rebuttal three and we will produce copies fully redacted but
19 if we look at the smoking history shown here as you interpret
20 this.

21 Q This would be somebody who quit in 1973, right?

22 A It looks like '73 to me.

23 Q But if we go and let me make sure I have got all the
24 names out, redact in a crude way, if we look at the history,
25 you look for a smoking history, he is shown as a current

page 6307

page 6308

1 smoker. Is that what that says, medical records, so is that

2 --

3 A Yes. You want to look at the date on the document.

4 Q Well, I apologize. I am trying to redact it with my
5 finger which is not always the best way to do it?

6 A The current as of what date.

7 Q That is what I am trying to -- it appears here is one I
8 have actually redacted. Date of exam 7/12/93. So we have on
9 this one, which again I just put out of what Dr. Mendelsohn
10 had done, we have a 20-year difference between the medical
11 record quit date and what he put in the POC?

12 A Yes.

13 Q And let's look at another one of those?

14 A I wonder if you could give me the claim number of that
15 first one.

16 Q First one is 10 -- I am sorry 3313352 and this one is for
17 the record, although we are calling it Wecker rebuttal 1, the
18 claim number appears to be 331517?

19 A Thank you.

20 Q And if we look at this one, he claims that he quit
21 smoking in 1976 and his recommendation on examination and the
22 examination was in 1993 was the doctor report: I have advised
23 the subject to discontinue smoking as soon as possible.

24 Now, as a non-physician working with medical records
25 and smoking histories and I know you have been in the tobacco

page 6308

page 6309

1 litigation now but this is sort of new for you, isn't it?

2 A Yes.

3 Q So we wouldn't expect you to have the same kind of
4 familiarity with proofs of claim and more importantly, medical
5 records as a long term physician like Dr. Harris would?

6 A This is true.

7 When it comes to the studying those Harris to read
8 doctor scrawls but I could do fine with the more than 2,000
9 computer records I prepared where I found some like this but
10 most that were quite consistent.

11 Q But you have not read them with the practiced eye of a
12 physician nor can you make a decision whether these are
13 reliable on as a physician?

14 A Yes. You are right.

15 (Continued on next page.)

16

17

18

19

20

21

22

23

24

25

page 6309

page 6310

1 CROSS EXAMINATION

2 BY MR. STENGEL:

3 Q Now, let's turn to CPS for a moment. I don't want to
4 retread old ground, but you have now -- I don't have the
5 transcript -- I think when Mr. Bernick asked you on direct
6 last week, you showed the jury one CPS for comparison but
7 mentioned that you had done a number of others, now you have
8 done still others, correct?

9 A You are correct.

10 Q How many comparisons have you done in total in this case?

11 A I could think of six.

12 Q You have shown two the jury?

13 A I didn't keep track of what he showed.

14 Q I think you have shown two?

15 A On a couple.

16 Q You were using various variables to try and get, in your
17 judgment, the appropriate comparison?

18 A Right.

19 Q And you did that because as we reviewed, when you were on
20 direct, there are some real problems with the CPS database,
21 right. You have testified to that?

22 A The problem here is the problem of using CPS-2 compared
23 to try to compare it to the general population. That is not
24 what we're doing here.

25 Q You think the CPS-2 --

page 6310

page 6311

1 MR. BERNICK: I don't think if the witness has
2 finished?

3 A I think I made it clear. There are some problems but the
4 problem comes up if you suppose that CPS-2 is a representative
5 population of the United States as a whole. It's not. I
6 mentioned that last week. Nobody's claiming that here. Now
7 we're trying to find a portion of CPS-2 that is a good
8 comparison.

9 Q The bias is in comparison to the general population?

10 A It's only a bias if you stumble into an error. It's not
11 a random sample.

12 Q If you stumble into an error, if you use the wrong
13 variables, you make the error?

14 A No, the error would be if you mistakenly thought that the
15 CPS-2 data was a random sample of the United States. It's
16 not. You would make a mistake if you looked and calculated
17 something from CPS-2 and found the average age is 55 and
18 supposed the average age in the United States as a whole was
19 55, it may well not be, because it's not a sample of the
20 United States.

21 Q Is it your opinion that the CPS-2 population is more like
22 the insulators than the general United States population?

23 A I don't understand. You have to rephrase that.

24 Q You said CPS-2 is biased because it's not like general
25 United States population, it's better educated --

page 6311

page 6312

1 A It's only biased if you are using it to represent the
2 United States population, then there would be a bias. It's
3 not inherently biased.

4 Q We would agree, I presume, looks like the American
5 population?

6 A Exactly.

7 Q It is more suburban?

8 A Right.
9 Q Better educated?
10 A Right.
11 Q More health conscious because of the volunteer aspect?
12 A Yes.
13 Q It is whiter?
14 A Yes.
15 Q It's wealthier?
16 A There is no income variable, but probably true.
17 Q You could infer from the data that you have?
18 A It would be a reasonable surmise.
19 Q All of those things are likely to impact whether the CPS
20 survey respondents are smokers, correct?
21 A As a whole, that's true.
22 Q Now, you spent some time, in this case at least, looking
23 at the Selikoff cohort of insulators?
24 A Yes.
25 Q As a general proposition, are they suburban?

page 6312

page 6313

1 A I don't have address information, but let's say they
2 would differ from the CPS-2.
3 Q Are they well educated?
4 A Again, they would differ from the average of all CPS-2.
5 Q Probably not wealthy, honest working people?
6 A They would differ from the average of CPS-2 on that
7 basis, I agree.
8 Q And you would agree that a group of doctors and
9 pharmacists and school teachers and judges and lawyers and
10 retail sales people don't particularly resemble the insulators
11 do they?
12 A They would differ in a number of respects, I would agree.
13 Q That would preclude making the comparisons as a
14 statistician?
15 A Not necessarily, there would be difference that you would
16 want to be concerned about if you were trying to compare two
17 groups. I described that concern any time that you compare
18 two groups.
19 Q I would like to -- Mr. Bernick used this little chart,
20 things that agree with Dr. Harris and things that disagree?
21 A Right.
22 Q I believe you, in candor you thought that you said Dr.
23 Harris had gotten pretty close in CPS-2, he could have done a
24 better job?
25 A Yes.

page 6313

page 6314

1 Q If he's right in the selection of B variables and he
2 produced a result in CPS-2 that would go into the Dr. Harris
3 column, if he's right?
4 A We'd have to add a little bit to that. If he's right on
5 the variables that he used and right on not using the ones
6 that he didn't use.
7 Q I meant everything, he's right?
8 A If he's right he's right.
9 Q Now, another addition that I would make to the support
10 for Dr. Harris is what appears in the published literature on
11 intervention, are you familiar with that?
12 MR. BERNICK: I would object at this point. Not only
13 were we prevented from pursuing it, I did not pursue it on
14 direct examination, it's not proper cross at all.
15 THE COURT: I don't care about this at this late
16 stage.

17 MR. STENGEL: I will abandon that, your Honor.
18 THE WITNESS: May I add a bit to that?
19 MR. STENGEL: I don't think there is a question
20 pending.
21 THE WITNESS: The last question I was going to say
22 something.
23 THE COURT: You may correct your answer.
24 A When I said he's right, I wanted to say more. Obviously,
25 if you ask me to assume he's right then he's right. But what
page 6314
page 6315
1 is he right about.
2 He would be right if the difference between
3 insulators and now a right comparison group is 1.2, because
4 that is the answer he gives, but not three, not 2.1, he would
5 not be right about that based upon a 1.2.
6 MR. STENGEL: I think we know your opinion. You did
7 a number of comparisons. Did you do an NHIS comparison?
8 A I did a modification.
9 Q And CPS-2?
10 A Yes.
11 Q And you looked at the comparisons between the insulators
12 and the claimants?
13 A Yes.
14 Q Mr. Bernick had another economist, Professor Heckman,
15 come in. Are you aware that he testified?
16 A Yes.
17 Q And he didn't do the CPS-2 comparison?
18 A I don't know what his work was. I saw that he was coming
19 but I didn't study his work.
20 Q You didn't consult with him on what you were doing?
21 A No.
22 Q You haven't called him and said --
23 A Never called him.
24 Q As far as you know the only thing that you overlapped --
25 A We used to be colleagues at the University of Chicago,
page 6315
page 6316
1 but we overlap as personnel friends, but I did not consult him
2 on the work here.
3 Q The only part that overlape with you is the NHIS
4 analysis?
5 A I don't know what he did.
6 MR. STENGEL: Nothing further, your Honor.
7 THE COURT: Thank you, Doctor.
8 MR. BERNICK: There is one point that the Court might
9 want to hear about, it's little bit unrelated, on the question
10 of breaking out the portion of the number that is bilateral
11 interstitial disease or asbestosis, as to whether you could
12 do that part of the numbers that are part of the damage claim
13 REDIRECT EXAMINATION
14 BY MR. BERNICK:
15 Q If you exclude non-disabling BID and disabling BID from
16 the yellow bars you would be left with the lung cancer bar?
17 A Yes.
18 Q Is that -- if you went to the damage numbers in the case,
19 and wanted to find out what the appropriate damage -- what the
20 damages are that are attributable to lung cancer, can you get
21 that by taking off this top line as an example?
22 A I did that calculation, but I didn't do it that way.
23 Q Is it possible -- is that proper way to do the
24 calculation or is there something else you have to do?
25 A The way I did it, that wouldn't be the same.

page 6316

page 6317

1 Q Why is that?

2 A Doesn't keep track of where -- what the actual and
3 counter factual is and trace it all through.

4 Q Do these numbers assume what is called competing risk?

5 A Yes.

6 Q And with competing risk, does it make it impossible to
7 simply separate out one disease and say here's the number that
8 is attributable to it?

9 A It makes it harder. You can't just draw a line through
10 it.

11 MR. BERNICK: That's all I have.

12 THE COURT: Thank you, Doctor. You can go home.
13 Nine o'clock tomorrow. We'll try to start at soon as we can.
14 We'll take care of the lunch.

15 (Witness exits courtroom.)

16 MR. BERNICK: We have motions. I take it that the
17 evidence is closed.

18 THE COURT: We have one document problem, people
19 probably want to get started on it. I take it we've covered
20 all of the document problems except in the January 16 letter
21 with respect to plaintiffs' exhibit group, these are the
22 letters, right?

23 MR. SHROEDER: The problem with the letters, at this
24 point in the case particularly they're trying to offer the
25 letters to show some kind of context as to how these had an

page 6317

page 6318

1 impact on the body of public knowledge. It puts us in an
2 impossible situation because in some instances we have a
3 letter coming from somebody else, most instances there are
4 letters, but we don't know the context. We don't know the
5 affect, if any, that letter had on the recipient and the
6 inference they're drawing, they may have gone out and told
7 somebody else the information they got from the tobacco
8 companies. That is contrary to the way that it was stipulated
9 we'd proceed in this case and that was without any individual
10 discovery on individual reliance issues, now they're trying to
11 back door into the case with these kind of letters.

12 THE COURT: I don't think that is so. I think they
13 do show what the tobacco companies were saying, there is no
14 doubt they show what they are saying. The real question is
15 the impact of conduct of the tobacco companies and the
16 difficulty with these letters is there is no way to measure
17 that unless you go through the traditional route of taking
18 depositions and finding what the evidence shows, and they're
19 not showing that.

20 THE COURT: I think this is the simplest thing for a
21 jury to determine. They know the difference between a retail
22 letter of this type and massive advertising or reports and
23 alike, and we can assume somebody whose wife gets a letter,
24 she'll talk to her husband, or if the husband gets the letter
25 he'll talk to the wife. There is some relationship, but this

page 6318

page 6319

1 is the kind of thing that the jury can handle very well. I'm
2 not going to exclude on that ground.

3 What are you putting in now? Which ones are there
4 dispute about.

5 MR. WESTBROOK: We've agreed to pull out the drafts.
6 It's a package of letters. We'll put them together. It just
7 says consumer letters. We'll have to identify them on the

8 exhibit list, or something.
9 THE COURT: Something neutral.
10 MR. SHROEDER: I didn't want consumer.
11 THE COURT: Something neutral.
12 MR. WESTBROOK: We did have one more, Exhibit 44747
13 on that Court Exhibit that we agreed to withdraw.
14 MR. MOLSTER: Yes, your Honor. There are three, your
15 Honor, 31311 of January 11 and 13770 and 44758, these are
16 transcripts of news programs like Larry King, 20/20 and they
17 need to be redacted to statements by the tobacco company
18 representatives. We'll work together and see if we work it
19 out.

20 THE COURT: If there is any question take it out.
21 Otherwise they're in as redacted.

22 Court Exhibit 107, which is the plaintiffs' group
23 exhibit letters to -- of choir or response, by the tobacco
24 companies I will turn back to you mark it up, because I want
25 it set by tomorrow morning. You will have to input it into
page 6319

page 6320

1 your list of documents.

2 MR. WESTBROOK: It's actually just a second set of
3 the first set and we'll put them together as one set.

4 MR. STENGEL: This is the letter that I referenced
5 earlier which was the cross exhibits for Dunbar Heckman and
6 Wecker. Apparently there was a miscommunication in
7 transmission.

8 Mr. Bernick has not seen that and well give him the
9 opportunity to review the list and lodge whatever objections
10 he may have.

11 MR. BERNICK: This is like the third letter from Mr.
12 Marlow. We come to court we find a letter and no one has
13 gotten it. I don't know if Mr. Marlow has a problem with the
14 fax machine or it's our problem and we'll review it before
15 tomorrow morning.

16 THE COURT: That is Court Exhibit 108. I have to get
17 all of these in. Tomorrow is the withching hour. The jury is
18 coming in at nine. You do have the jury charge for
19 discussion.

20 MR. MANSFIELD: We do, your Honor. When would like to
21 take up some additional observations about them.

22 THE COURT: I could take them up now or bring you at
23 eight in the morning, what do you want to do. You have to
24 know what the charge is when you argue.

25 MR. BERNICK: That's the problem.

page 6320

page 6321

1 What do you want to do?

2 MR. MANSFIELD: I think we can do it now. We just
3 got the redraft we agreed to go through it. There are certain
4 observations that I could make now, others if we have a break,
5 we could come back.

6 THE COURT: How much time do you want to devote to
7 it. We can go and have a quick supper and come back.

8 MR. MANSFIELD: Let me raise one issue --

9 THE COURT: I want you to go through this charge and
10 I wanted when we get finished, an agreement on every single
11 word and page of this document, and that I want to do in a
12 systematic way.

13 When you begin to argue tomorrow you know what the
14 jury is going to be told by the Court. I don't see how we can
15 proceed in any other sensible way. If it will take an hour or
16 two I suggest that we break, we had a very short lunch, have a

17 quick bite and come back and work. The alternative is to come
18 in tomorrow. I had planned to come in at eight, I could come
19 in at 7:30. Or we can go over another day. I do not want
20 summation to begin unless all of the little loose ends have
21 been tied neatly together.

22 MR. MANSFIELD: We'd be prepared to proceed in about
23 ten minutes, your Honor.

24 MR. BERNICK: I guess the question we wanted to make
25 sure that we timely make on our motion, to strike

page 6321

page 6322

1 Dr. Harris testimony.

2 THE COURT: It may well be you can't try to get all
3 the summation in tomorrow. I don't want to rush anybody.

4 THE COURT: It has been a very difficult case for
5 counsel. I know you've been working very hard. I really
6 admire the quality of your work and I'm not going to rush
7 you. If we start rushing and not getting these things tied
8 down right at this stage, it's going to create a problem.

9 MR. BERNICK: I would have a suggestion. We take
10 five and caucus among ourselves and see what make sense.

11 THE COURT: I'm available. I have no compunction
12 about putting the jury off. All I want is a complete
13 agreement on how the jury is going to be charged. I want every
14 document in or out. I want the list prepared and agreed to,
15 so when I turn it over to you, who is going to argue, you will
16 know what the ground rules are.

17 Take five.

18 (Recess taken.)

19 MR. MANSFIELD: Your Honor, we are --

20 THE COURT: Counsel.

21 MR. MANSFIELD: We're prepared to go forward this
22 evening so that we can could summation tomorrow morning. We
23 have some substantive observation about the verdict form and
24 instruction and always some more in the nature of
25 typographical errors. We're prepared to go page by page. The

page 6322

page 6323

1 way to start is to do substantive issues.

2 THE COURT: We'll do it any way we wish. If we're
3 going to do that, I suggest we take half hour break. I
4 haven't going to lunch.

5 I will go across the street and get a cup of coffee
6 and those of you who want to can continue with those problems
7 on the documents. Just a few of them so that we can get
8 everything out of the way. I don't want to keep you too long,
9 whoever is going to be arguing tomorrow wants to prepare.

10 MR. BERNICK: The documents that are on Mr. Stengel's
11 list I cannot stay.

12 THE COURT: Can't anyone in your office.

13 MR. BERNICK: I don't know if anyone knows them as
14 well as I do. They're not all here.

15 THE COURT: What time do you want to come in?

16 MR. BERNICK: 8:30. Those that are leaving I will
17 see at 8:30 tomorrow.

18 (Followed on next page.)

19 (Recess taken.)

20 THE COURT: Good evening, gentlemen and ladies,
21 counsel and others. I didn't refer to counsel as a lady, I
22 referred to the paraprofessionals.

23 MR. KRAUS: Your Honor, we need assistance on
24 redaction issue that is critical to the process that is going
25 on across the hall. If you remember you ruled earlier in the

page 6323

page 6324

1 case that if there was redaction that was done by blacking out
2 and that was shown to the jury, it could say that way,
3 otherwise we ought to do the traditional redaction where you
4 whiteout or cover the portion that is going to be redacted and
5 just put in the word redacted.

6 It's a significant problem, the way the plaintiffs
7 have done it has left large portions that should have been
8 unreadable readable. If I give your Honor an example.

9 We have a solution, your Honor. The first document
10 that I handed you they were supposed to redact the legend on
11 the side. They cannot do it and it runs over the type face.
12 That means you can read the very thing that you are are
13 supposed to black out. We've done a complete set yourself,
14 that was done correctly with whitening out as opposed to
15 blacking out. All we want to do is get a direction that they
16 should use the set that we created.

17 THE COURT: Take a look at it. Why don't you want to
18 use their set.

19 MR. BICKS: I don't think we have an objection.
20 People were redacting documents with black.

21 MR. KRAUS: We have it.

22 THE COURT: Take a look at what they have and if
23 possible use it.

24 MR. KRAUS: We should go ahead to the instruction but
25 I will walk across the hall.

page 6324

page 6325

1 THE COURT: Try to work it out.

2 MR. MANSFIELD: Your Honor, we're prepared to
3 proceed. We can either go page by page.

4 THE COURT: Anyway you wish, I want by the time we're
5 finished every objection dealt with.

6 MR. MANSFIELD: We can start on page one.

7 THE COURT: What is the first page that anybody has a
8 problem with.

9 MR. MANSFIELD: So that we don't burden the Court,
10 would the Court like typographical errors.

11 THE COURT: Yes, everything.

12 MR. MANSFIELD: The very first page I think should be
13 January 16, 2001.

14 THE COURT: We'll take out the word discussion too,
15 put the full title at the top of the charge.

16 MR. MANSFIELD: Next on page three the Roman numerals
17 to the left of concluding remarks should be eight. The next
18 one should be in sequence.

19 THE COURT: How is that in the text?

20 MR. MANSFIELD: We made conforming changes. Next on
21 page four, the last line of the page is just a typographical
22 error, the word "of" should be "on".

23 THE COURT: What is that sign at the end, shouldn't
24 that come out the capital I.

25 MR. MANSFIELD: It will.

page 6325

page 6326

1 THE COURT: Okay.

2 MR. MANSFIELD: On page 12, your Honor, this is --

3 THE COURT: The plaintiffs have anything earlier,
4 just chime in.

5 MR. FINK: We're up to 12 as well.

6 MR. MANSFIELD: On the first line the word damages
7 should be dangers.

8 THE COURT: Yes.
9 MR. MANSFIELD: In the last paragraph we suggest that
10 it should read the Trust three legal theories are. Inserting
11 the word Trust.
12 THE COURT: We'll put a colon after are.
13 MR. MANSFIELD: Page 13, just a typographical
14 matter. The last full line of the first paragraph --
15 THE COURT: Why do you have to stand up, wouldn't you
16 be more comfortable sitting down.
17 MR. MANSFIELD: I'm fine.
18 THE COURT: Where is this?
19 MR. MANSFIELD: The last full line of the first
20 paragraph capital T Trust. The next paragraph second line
21 we'd ask the Court to delete the word synergy. It's the
22 defendant's factual contentions.
23 THE COURT: What is the plaintiffs' feeling.
24 MR. BICKS: The question is what are we going to put
25 in.

page 6326

page 6327

1 THE COURT: This is the defendants' contention. They
2 want to take synergy out. They're entitled to do that.
3 MR. MANSFIELD: I suppose as I'm looking at it, under
4 the title next to B, it should be defendants' plural
5 possessive.
6 THE COURT: Correct.
7 MR. MANSFIELD: Back to the second full paragraph,
8 the sentence -- the line begins with the word workers, it
9 should read synergy as a result of--
10 THE COURT: You want synergy in there.
11 MR. MANSFIELD: There, yes.
12 MR. MANSFIELD: The last full line of that paragraph
13 the word "between" caused and injury.
14 THE COURT: Caused the injury.
15 MR. MANSFIELD: The next observation is on 14.
16 MR. BICKS: On 13 I have some changes. To make it
17 clear these are defendants contentions as are before the
18 Trust's contention, so somebody would not read this --
19 THE COURT: I want to put in defendants' contend.
20 MR. BICKS: Its balanced as to the Trust's
21 contentions.
22 THE COURT: Okay. Each defendant denies that it has
23 misled the Trust or committed any other wrong to the Trust.
24 Defendants contend that lower case for the moment. They
25 contend that the Trust has settled claims --

page 6327

page 6328

1 MR. MANSFIELD: We do object to the -- these
2 uncontested statements we do object to having them proceed by
3 the defendants' claim.
4 The Trust has a right to seek adjustments for the
5 TDP. There has been no evidence in the case to the contrary.
6 There is no evidence about the smokers discount.
7 MR. MOLSTER: Or the ten percent. They have said it
8 repeatedly.
9 MR. FINK: With respect to the ability to amend the
10 TPD, that is something that is easy to do, there is evidence
11 it's not easy to do. I think it's appropriate to mark them as
12 such.
13 THE COURT: We'd better put this in. We have some
14 unsophisticated jurors. I'm returning this so that you can
15 show it to your learned opponent.
16 MR. MANSFIELD: On the fourth line down on that very

17 same page, we're missing a word, it's the sentence that begins
18 the Trust has settled claims against and the word it --
19 THE COURT: Against the Trust.
20 Next.
21 MR. MANSFIELD: On page 14. The first full paragraph
22 on page 14 should be written in the singular. There is only
23 one federal claim. The first line it should be nature of this
24 claim.
25 The second line these claims should be this claim.

page 6328

page 6329

1 Further along on that line it should be this federal statutory
2 claim.
3 The first line after burden of proof, after the word
4 RICO claim should be singular.
5 The first line under heading B, it should be the
6 Trust claim, the word first should be deleted.
7 THE COURT: Yes.
8 MR. MANSFIELD: Our next observation is page 23.
9 THE COURT: Do the plaintiffs have anything before
10 that? No.
11 MR. MANSFIELD: Just under paragraph 4 the word
12 should be misled on the first line, past tense.
13 THE COURT: The A comes out.
14 MR. MANSFIELD: Yes.
15 MR. BICKS: I don't know how much you care about the
16 typographical stuff, four and five, after four we have an and
17 at the end of the number four, which probably should come out,
18 and Trust number five, if you want to move the Trust over so
19 it lines up. And a period after reliance on number six. I
20 don't know how constructive things are at this stage.
21 THE COURT: We want to get it as good as we can.
22 We'll move Trust over one space. That is good. No matter how
23 many times we'll go over it I will pick up a half a dozen.
24 MR. MANSFIELD: Page 25.
25 THE COURT: Yes.

page 6329

page 6330

1 MR. MANSFIELD: The first letter, full paragraph,
2 third line, the wordy priced should be depriving. Your next
3 observation is on page 28.
4 This is the first full paragraph and this deals with
5 the stipulation that the party entered into.
6 THE COURT: You want to change that?
7 MR. MANSFIELD: I would like to use the language of
8 the stipulation. The language of the stipulation where this
9 should pick up is --
10 THE COURT: The first sentence is okay, right.
11 MR. MANSFIELD: Of the first full paragraph the first
12 sentence is okay.
13 THE COURT: How do you want the second?
14 MR. MANSFIELD: After the phrase do not contest that,
15 it should read the requirement that matters or things or
16 sent --
17 THE COURT: Requirement --
18 MR. MANSFIELD: Matters or things were sent or
19 delivered through the mails, were satisfied. We'd pick up
20 again with the word satisfied, it should be was satisfied.
21 That's the precise language from the stipulation.
22 THE COURT: The parties are satisfied with that. I
23 am.
24 MR. FINK: Yes, your Honor.
25 MR. MANSFIELD: Our next would be a conforming --

page 6330

page 6331

1 THE COURT: Excuse me a moment.

2 MR. FINK: Your Honor, just a minor change on that
3 same paragraph, if you drop to the second to the bottom line,
4 in the stipulation effects the Trust's burden of proof each
5 and every -- it should say other element.

6 MR. MANSFIELD: Yes, that is part of the stipulation.

7 THE COURT: Okay.

8 MR. MANSFIELD: Our next observation is page 29 and
9 it's a conforming change with respect to the wire fraud
10 statute.

11 In the second full paragraph the fourth line, after
12 the word that, it should read that the requirement that
13 matters or things were transmitted by means of wire, radio or
14 television communication has been satisfied, and that would
15 replace the words, the requisite numbers and times require
16 transmission with.

17 THE COURT: The requirement that matters or things
18 were transmitted by means of wire, radio or television
19 communication has been satisfied.

20 MR. MANSFIELD: Yes, your Honor.

21 THE COURT: As to mail, you said was satisfied but
22 here you want has been --

23 MR. MANSFIELD: I would keep it parallel.

24 THE COURT: You want was.

25 MR. MANSFIELD: Was satisfied. Our next is on page

page 6331

page 6332

1 32.

2 MR. FINK: Your Honor, if I may, on page 30, this may
3 help if you go back to 29, we're looking at the reliance
4 element. When we get to the top of page 30, consistent with
5 the Court's prior rulings and the nature of the scope of the
6 fraud, we're proposing adding some language that makes clear
7 reliance need not be tied to specific statements. What we
8 propose doing --

9 THE COURT: Slow down.

10 MR. FINK: Yes.

11 THE COURT: Conduct of the defendant period.

12 MR. FINK: And we'd add the following.

13 Given the scope of the alleged misconduct, this
14 element does not require proof of reliance on individual
15 statements made by the defendants, and add another sentence;
16 it may also be satisfied by proof of reliance on the totality
17 of their statements and can be proved by way of statistical
18 evidence.

19 Your Honor, I note for future reference that we also
20 object overall to the requirement of reliance by the Trust.

21 THE COURT: Let me just read it.

22 The defendants oppose.

23 MR. MANSFIELD: We strongly object.

24 THE COURT: I am not going to give it. It's already
25 covered in the statement of the basic claim. I haven't made

page 6332

page 6333

1 it one statement to one person. I said statements. I have
2 covered it sufficiently.

3 Next.

4 MR. MANSFIELD: 32 typographical error, the top line
5 should be federal claim, the last word.

6 THE COURT: Yes, singular.

7 THE COURT: We've shifted over, should we say to the

8 Trust's other claims. I haven't picked them all up because it
9 was originally written as plural plaintiffs, so I will put the
10 Trust's singular, apostrophe S, other claims.

11 MR. FINK: Yes, your Honor.

12 THE COURT: I haven't picked them all up, it's okay.

13 MR. MANSFIELD: That's all to this page.

14 MR. FINK: With respect to the statute of
15 limitations --

16 THE COURT: Where is that?

17 MR. FINK: On page 32. I know we've gone over this,
18 we're very concerned that the statute of limitations
19 instruction may be read by jurors to suggest that the entirety
20 of the Trust's claim could be dismissed in the event they
21 think that conduct happened -- that events arose before the
22 cutoff dates or the dates that are indicated here.

23 As we understand the Court's ruling, that is not the
24 case. It's only a portion of the injury that arose from
25 plaintiffs' claim and we haven't put in evidence as to that.

page 6333

page 6334

1 Particularly at the end of the instruction the Court has a
2 section called time limitation that says plaintiffs can only
3 recover for injuries --

4 THE COURT: That first paragraph is wrong in light of
5 the second and misleading in light of the opening. I would
6 like to take that out.

7 MR. MANSFIELD: The first what, your Honor?

8 THE COURT: The first paragraph. Itself covered more
9 accurately in the second.

10 MR. MANSFIELD: As to the fraud claim it's accurate.

11 THE COURT: Why?

12 MR. MANSFIELD: If they knew of the fraud claim prior
13 to 1991, and sat on their rights, the claim is barred. There
14 is evidence in the record to support it and we'll argue, that
15 they knew as of 1988, all the elements of a fraud claim.

16 MR. FINK: Here we're dealing with the RICO claim.
17 In any event, the Court's rulings, as we understood them, with
18 respect to all the Trust's claims, we went over this, I
19 thought the last time that we went over the instruction, the
20 Trust claims were only barred to the extent that they related
21 to claims filed with the Trust prior to whatever cutoff date
22 applies.

23 MR. MANSFIELD: We don't challenge that. With
24 respect to the fraud claim, if you know all the elements of
25 the fraud in 1988, your statute limitation triggers.

page 6334

page 6335

1 MR. FINK: Not in a case like this where there is a
2 continuing injury where the claimants accrue.

3 MR. MANSFIELD: That would be an issue to argue to
4 the jury. If the jury finds it our way, than they would be
5 barred all together.

6 MR. KRAUS: They can't have it both ways. On the one
7 hand they argue that they have sufficient information to bring
8 a claim for future damages. It that is true they could have
9 brought it at any given point in time and the statute of
10 limitations ought to bar it as soon as they knew the
11 underlying facts for liability and not the damage facts.

12 The paragraph is correct, your Honor.

13 MR. FINK: First of all, when talking about this
14 paragraph, remember it's in a RICO context. If they were
15 right as to fraud it would not fix the problem here. The
16 Court's ruling on summary judgment with respect to the fraud

17 claim says accordingly plaintiffs may seek recovery for claims
18 filed with the Trust on or after December 31, '91. Recovery
19 before that date is barred by the statute of limitation.

20 MR. KRAUS: There is the issue of recovering for
21 damages, as to that, what Mr. Fink read is correct. You
22 cannot recover for damages that accrued before the statute of
23 limitations bar. But there is always a liability question and
24 the liability question rises when you knew sufficient facts to
25 bring your claim.

page 6335

page 6336

1 The fact that you may be accruing damages down the
2 road, does not change the fact for liability purposes you knew
3 enough on the given point in time to bring the claim, if you
4 didn't bring it within the statute of limitations you are out
5 of court.

6 THE COURT: You don't have to bring a claim
7 prospectively. You could have brought a claim for damages up
8 to that date.

9 MR. MANSFIELD: If a fraud had been completed and you
10 are aware of the fraud and the elements the six year New York
11 statute begins to run.

12 THE COURT: Not all there are damages.

13 MR. KRAUS: The theory of their case they can prove
14 their damages and they knew them at the given point in time
15 because of their ability to estimate futures. Their cause of
16 action accrued at the point in time they knew the facts of the
17 defendants' fraud, alleged fraud.

18 MR. MANSFIELD: The proof of the pudding is 2001 to
19 2002.

20 THE COURT: It's troublesome.

21 MR. FINK: In your summary judgment opinion what the
22 Court noted the alleged injury suffered by the Trust occurred
23 on the date each claim was filed, because that is the earliest
24 possible date that the Trust could discover that particular
25 injury.

page 6336

page 6337

1 MR. MANSFIELD: With respect to damages we have
2 quarrel.

3 MR. FINK: This is the date of injury, in the courts'
4 opinion.

5 MR. KRAUS: We argued it and you put it in and it was
6 correct then and it is now.

7 MR. FINK: Respectfully, yesterday when we went over
8 this with respect to -- it came up first in the issue of the
9 other two claims. I'm flipping the page where it appears with
10 the fraud on page 39 and the Court made sure that the language
11 was clear that it was only a portion of the Trust.

12 THE COURT: That is true. It's a puzzling problem
13 with respect to prospective damages. Only when you suffer the
14 damage that the cause of action accrues, we all agree to that.

15 MR. MANSFIELD: When you suffer the injury, that is
16 when it accrues.

17 THE COURT: The question is when we have a continuing
18 series of damages and you haven't sued as to the first injury,
19 can you subsequently sue when the second injury comes up.

20 The general rule in the asbestos cases, which is
21 somewhat like that, I think in some of the other cases is,
22 that you have the right to sue each time.

23 MR. KRAUS: These are not distinct injuries. These
24 are not injuries that you cannot foresee at the point in time
25 when the statute is triggered. They're argument they know now

page 6337

page 6338

1 what their damages will be through 2002.

2 THE COURT: I think the plaintiffs have that option.

3 MR. KRAUS: By a party of reasoning they could have
4 said the same thing in '91 or '95.

5 THE COURT: They do at least in theory sue for each
6 claim as filed.

7 MR. MANSFIELD: They could have brought the claim in
8 1988.

9 THE COURT: For the period up to 1988.

10 MR. MANSFIELD: For the very same theory, they can't
11 do it both ways, in 1988 their claims estimation was
12 sufficiently robust as they claim now, that they could
13 project --

14 THE COURT: I understand the problem. It's an
15 interesting one, but I think this is a case where there is a
16 separate cause of action accruing for each claim or for each
17 group of claims.

18 MR. KRAUS: Then the statute of limitation accrues by
19 the minute.

20 THE COURT: By the minute.

21 MR. KRAUS: Every time a new claim comes in you would
22 say that is a statute of limitations.

23 THE COURT: That is possibly right, if they haven't
24 sued before. In this case now, they have sued for everything
25 up to 2049. I have cut them off. I said you haven't proved

page 6338

page 6339

1 the period 2002 to 2049 so they are cut off forever.

2 I suppose they could have sued for the period up to
3 2000 and then next year brought a suit for 2001.

4 MR. MANSFIELD: Under certain statutes that might be
5 right. Under the Craighton act, every overt act is a
6 different injury, new claim. That is not the law of common
7 law fraud in New York.

8 THE COURT: I understand your point. I think I have
9 covered it. I'm going to take out the last two sentences I
10 think there going only to confuse the jury.

11 What else?

12 MR. FINK: Which are the two sentences.

13 THE COURT: If the lawsuit is not brought and in such
14 an event.

15 MR. FINK: I think also, just to make this clear for
16 the jury, when you drop to the next paragraph, on the last
17 line, rather than saying with respect to those pre November
18 11, 1995 Trust federal claims, what might be more clear would
19 be with respect to any part of the, and I would strike the pre
20 November 11, '95. With respect to any part of the Trust's
21 federal claims and insert the words where the claim arose
22 prior to November 11, 1995.

23 THE COURT: I will leave that as is.

24 What else?

25 MR. MANSFIELD: Just for conforming it should be

page 6339

page 6340

1 federal claim in both the last line of the second full
2 paragraph and the second to last line and it should be to
3 this -- the last line of the second paragraph it should be
4 with respect to this.

5 THE COURT: With respect to --

6 MR. MANSFIELD: This pre November.

7 MR. MANSFIELD: Just to make it read right.

8 In the fourth line of the second paragraph, after the
9 word bringing, delete any of.

10 MR. FINK: If I understand the changes that counsel
11 just proposed, turn this back into -- it now reads, therefore,
12 if you find the Trust knew, or through reasonable diligence to
13 alert a reasonable person as to the possibility of bringing
14 the federal claim prior to November 11, '95 it's your duty to
15 find for the defendants with respect to this federal claim.

16 It now reads that the entire claim goes out, which is
17 contrary to what we just discussed.

18 THE COURT: Well, I see the problem. I will do it
19 this way. The possibility of bringing any federal claim prior
20 to November 11, 1995, then it's your duty to find for the
21 defendants with respect to a pre November 11, 1995 Trust
22 federal claim.

23 Anything else on 32.

24 MR. FINK: Yes, your Honor. Again, at least for the
25 record I want to note that we're concerned that this language
page 6340

page 6341

1 would lead the jury to think that the entire claim goes out.
2 The statute of limitations is mandatory permanent defense and
3 there should be a sentence that says that. The burden -- the
4 defendants' bear the burden to demonstrate that any portion of
5 the Trust claims is barred by the statute of limitations.

6 THE COURT: As affirmative defense at the top.

7 MR. FINK: Yes, your Honor.

8 THE COURT: Then I will add, I will discuss this
9 matter later in the charge.

10 MR. MANSFIELD: Our next observation is on page 35,
11 the last line under F. After the word acting, we asked the
12 the Court to insert within the scope of its agency.

13 THE COURT: Yes.

14 MR. BICKS: At the end of the first paragraph the D,
15 the last --

16 THE COURT: Scope of the agency because it could be
17 his, her or its.

18 MR. MANSFIELD: Yes, your Honor.

19 THE COURT: Yes.

20 MR. BICKS: So the governor of New York will not be
21 upset, we need to capitalize State of New York under D.

22 THE COURT: You want state capitalized.

23 MR. MANSFIELD: We take no position on that, your
24 Honor. Next is page 36. This is in the new section H. The
25 first typographical error in the first line, plaintiffs should

page 6341

page 6342

1 be plural possessive or Trust's.

2 THE COURT: I will put Trust's.

3 MR. MANSFIELD: In the second line in the middle
4 claimant should be plural. The third line claimant should be
5 plural. Trust capitalized. Defendants plural possessive.

6 And then in the fourth line after the word statute
7 we'd ask the Court to insert the elements of which --

8 THE COURT: I will take state out there.

9 MR. MANSFIELD: -- the elements of which I have
10 explained. We don't want the jury to be under the
11 impression --

12 THE COURT: Yes, I understand.

13 MR. MANSFIELD: Our next is on page 37.

14 MR. BICK: Just so we clean up the typos. Under
15 Common Law Fraud, the last sentence, plaintiffs the apostrophe
16 should come out.

17 MR. FINK: Under consistency the theory of the Trust.
18 THE COURT: Yes.
19 MR. BICK: On the next line the next paragraph --
20 THE COURT: Yes, there is an extra apostrophe. I
21 will read this again tonight or the first thing in the morning
22 and I may find some more of these typographical errors.
23 I take it as a matter of substance there is no
24 objection?

25 MR. MANSFIELD: Would your Honor want me to skip

page 6342

page 6343

1 typographical errors?
2 THE COURT: No.
3 MR. MANSFIELD: Page 37, paragraph 4, the second
4 line, it should be misled in the past tense.
5 THE COURT: It's singular.
6 MR. MANSFIELD: The a comes out.
7 MR. BICKS: On 37, you see the last sentence at the
8 bottom starts out with consider. Again, if we don't care
9 about this, I will not raise it, it's not lined up with the
10 rest.
11 THE COURT: You are right. Thank you.
12 MR. MANSFIELD: Page 38, under justifiable reliance,
13 third line, misrepresentation, and the word should be that.
14 THE COURT: Yes, thank you.
15 MR. MANSFIELD: In the next paragraph the third line
16 instead of a corporation, we'd substitute the words and
17 organization.
18 THE COURT: Okay.
19 MR. FINK: The line above that the word claimants
20 should be plural. Again for the record we want to preserve our
21 objection to its reliance objection.
22 THE COURT: I cannot hear you.
23 MR. FINK: For the record, again we'd like to
24 preserve our objection with respect to reliance as to the
25 Trust.

page 6343

page 6344

1 THE COURT: Yes. That is continued. Let me take a
2 break for a few minutes and then we will finish up.. We
3 should have the charge. You, counsel, are not going to do the
4 documents at all.
5 MR. MANSFIELD: Just the charge and the verdict form
6 for this evening.
7 THE COURT: I will take a break and then we'll finish
8 up. I wanted to know when to call my wife.
9 Do you think we'll be finished by seven the way we're
10 going.
11 MR. MANSFIELD: Yes, your Honor.
12 (Recess taken.)
13 MR. MANSFIELD: Your Honor, we are --
14 THE COURT: Counsel.
15 We're back to page 38.
16 Anything else?
17 MR. FINK: No, your Honor.
18 THE COURT: Next.
19 MR. MANSFIELD: Page 41.
20 MR. FINK: We have something at 39 at the top of the
21 page, the statute of limitations, we have to put in a
22 confirming change about the burden of proof.
23 THE COURT: As affirmative defense?
24 MR. FINK: Yes, your Honor.
25 THE COURT: Yes. 40.

page 6344

page 6345

1 MR. MANSFIELD: Our next Exhibit 41, your Honor.
2 Under C, common knowledge, aside from a space between the
3 words trust and/or, the phrase to the Trust later on in that
4 line should be deleted.
5 THE COURT: Yes.
6 MR. MANSFIELD: Our next is page 43.
7 MR. FINK: We have a comment on the common knowledge.
8 THE COURT: I will take out cigarettes because it's
9 cigarettes and the asbestos. In the heading I will just say
10 common knowledge.
11 MR. MANSFIELD: We agree.
12 MR. FINK: Your Honor, on this common knowledge
13 point, and I won't repeat all of our reasons that we advanced
14 earlier why we think this is inappropriate instruction, to the
15 extent this is being inserted as some form of defense, we
16 think it would be appropriate to include language here
17 indicating that the defendants bear the burden.
18 THE COURT: I don't think that is right. Denied.
19 MR. MANSFIELD: Our next is page 43. This is under
20 spoliation and we would -- do you have something before that.
21 MR. FINK: Your Honor, on page 42, this is -- the
22 carry over section of the continuation of the superseding
23 intervening cause section, which began on page 41 and
24 yesterday the Court removed language indicating that the
25 defendants bore the burden on this point and suggested to

page 6345

page 6346

1 plaintiffs that if we could show it was an affirmative
2 defense, that the Court would reinsert that language.
3 THE COURT: I said that I would reconsider it.
4 What have you on it?
5 MR. FINK: We brought authority demonstrating that is
6 affirmative defense.
7 THE COURT: What is your authority?
8 MR. FINK: The Elmo is off.
9 THE COURT: Do we have it on New York pattern.
10 MR. MANSFIELD: The first case your Honor is Ideal
11 Mutual Insurance Insurance Company, reported at 532 New York
12 Supp 2d, at 371, and this is a decision of the First
13 Department.
14 Reading from page 375, your Honor. Defendants are
15 essentially asserting that their conduct, even if negligent,
16 cannot be held to be the responsible causative factor of the
17 ultimate injury suffered by Ideal because of the misconduct of
18 a third-party -- i.e., the superintendent's office as
19 regulator close paren, intervened to become a superseding
20 cause, which broke the causal nexus between defendants conduct
21 and Ideal's demise.
22 Skipping, down. Accordingly, the pleadings of this
23 affirmative defense was sufficient and properly upheld at this
24 stage by the motion court. And then your Honor --
25 MR. MANSFIELD: Is that PJI:123.

page 6346

page 6347

1 THE COURT: What is the intervening cause here.
2 MR. MANSFIELD: Any number, but the relationship
3 between the Trust and through the TPP and the claimants, all
4 of the other decisions, all the mismanagement, all the
5 allegationS that we even tend to prove the waiver of the
6 statute of limitations, for example, as we saw today, 1974,
7 the Trust could have said with respect to that file there

8 would be no compensation. Once the Trust makes these
9 independent decisions those are intervening decisions and the
10 defendants would no longer be libel. It would end up being --
11 THE COURT: Take out approximate at the top. I don't
12 want to throw in a new word. I suppose it applies here to
13 more than the Trust. The Trust doesn't strike me as a
14 particularly good example of an intervening cause but an
15 intervening cause would be the employer who failed to
16 supply --
17 MR. MANSFIELD: Mansville itself.
18 THE COURT: I will put it in, but the question is --
19 MR. FINK: I have authorities that address the burden
20 issue.
21 THE COURT: Let me see what the pattern says.
22 THE COURT: The pattern says it's a jury question.
23 MR. MANSFIELD: Pattern injury instruction does not
24 say it's an affirmative defense.
25 THE COURT: I don't see where it does.

page 6347

page 6348

1 MR. MANSFIELD: It goes to parts of causation which
2 is plaintiffs' burden.
3 MR. FINK: If I may hand up to the Court --
4 THE COURT: Would you hand up the cases, please.
5 MR. FINK: There are more but I think these are
6 representative.
7 (Documents handed to court.)
8 THE COURT: Do you want to look at these cases.
9 (Handed to counsel.)
10 MR. FINK: There is one other case, it's a Second
11 Circuit opinion.
12 (Shown to court.)
13 THE COURT: This is unpublished. 173 F 3d, 845. Do
14 you want to hand that to the defendants?
15 MR. FINK: I will, your Honor.
16 MR. MANSFIELD: I think the difficulty here is that
17 while the highlighted portion of these cases seem to say what
18 they say, there is a distinction in New York law between
19 superseding cause, intervening cause and on occasion you will
20 see language of superseding intervening cause.
21 The Second Circuit case is apparently applying
22 Vermont law. One of the two cases was in a summary judgement
23 content and in the third it simply says the burden shifts to
24 show some other activity that might have contributed to the
25 loss. I'm not certain any of these cases are dealing with

page 6348

page 6349

1 what we're dealing with here which is the in true mentality of
2 Mansville, the Trust, the TDP, the plan and so forth and on
3 the impact whether we're libel for any part of the damage.
4 THE COURT: It's tricky. I don't consider this as a
5 burden, it seems to be part of the basic proof.
6 I will put it in and at 8:30 if you come up with
7 something I will strike it out. I have to put it in as a
8 separate item.
9 On page 44 just above damages, the burden is on the
10 Trust, I burden of proof. I have already used burdens of
11 proof, but not in connection with general burdens. I will
12 call this burdens of proof generally. New catch line --
13 MR. BICKS: What page?
14 THE COURT: 44, just above seven, damages. Burdens
15 of proof generally, I. Burden of proof is on the Trust as to
16 every element I have described except in the case of

17 affirmative defenses or as otherwise noted in this charge when
18 the burden of proof is on the defendant. We'll knock that out
19 tomorrow, if you could come up with something. It's a tricky
20 business. Let me put it in the table of contents burdens of
21 proof generally.

22 MR. MANSFIELD: This is under dispoilation heading on
23 page 43. The last sentence on page 43, which carries over to
24 44 and the first sentence on 44 we believe is unclear as
25 written.

page 6349

page 6350

1 THE COURT: How would you like it?

2 MR. MANSFIELD: We'd propose the following. The
3 sentence would be without evidence of destruction designed
4 deliberately to conceal evidence of wrongdoing, documents --
5 excuse me -- you may not find that any documents that were
6 destroyed would be favorable to the Trust case. We'd propose
7 that sentence.

8 THE COURT: Wait a moment, please. You may not
9 find --

10 MR. MANSFIELD: That any documents that were
11 destroyed would be favorable to the Trust case. That sentence
12 would replace the two sentences that end the spoilation
13 charge.

14 THE COURT: Then you have to say the opposite too,
15 don't you?

16 MR. BICK: Yes.

17 THE COURT: I haven't told them that they could do
18 it.

19 MR. MANSFIELD: We don't believe there is an
20 evidentiary basis in the record --

21 THE COURT: I cannot give it. I will leave in that
22 spoinlation may lead to a conclusion that destroyed documents
23 might be favorable to the Trust's case.

24 MR. MANSFIELD: If it must be.

25 THE COURT: Okay.

page 6350

page 6351

1 MR. FINK: Your Honor, if we keep that, which you
2 think is appropriate, I believe that in the prior sentence was
3 removed, we just need to make sure that spoliation is
4 defined.

5 MR. MANSFIELD: If we used deliberate destruction.

6 THE COURT: I think that is better.

7 MR. FINK: That is fine, your Honor.

8 MR. MANSFIELD: To conceal evidence of wrongdoing.
9 Use the definition.

10 THE COURT: I ought to change the catch line too.
11 Instead of spoliation, deliberate.

12 MR. MANSFIELD: We have to say deliberate and
13 wrongful destruction.

14 THE COURT: Deliberate destruction to concealed
15 evidence.

16 MR. MANSFIELD: Evidence of wrongdoing.

17 MR. FEIWUS: On the spoilation point, I believe there
18 was evidence that only some of the defendants destroyed
19 documents either pursuant to a policy or not. Can we add a
20 sentence to this, clarify for the jury this is not an issue as
21 to all the defendants.

22 THE COURT: That conclusion can only operate against
23 a party who so destroyed.

24 MR. MANSFIELD: Our next is on page 45, your Honor.
25 This is under compensatory damages and I will read more

page 6351

page 6352

1 quickly.

2 This is in the third paragraph under compensatory
3 damages. At the end of the sentence I think we should add
4 after the word suffered, in that it has paid or proved the
5 claim --

6 THE COURT: No. Next.

7 MR. MANSFIELD: Page 47. Under time limitations, in
8 the first sentence after the word time, we need to insert the
9 word limitations on.

10 THE COURT: Limitations -- time limitations.

11 MR. MANSFIELD: Typo in the third paragraph, under
12 time limitations, just before the 349 it should be section
13 sign not plural.

14 THE COURT: Yes.

15 MR. MANSFIELD: Page 49, just conforming change
16 before concluding remarks. This is now Roman Numeral 8.
17 We're now on the verdict form, page 52, under amendment, see
18 amendment.

19 Let me tell you what the concept is and I will read
20 the language. There we believe that to the extent that the
21 jury is taking into account mitigation, this is where the
22 concept needs to be in the verdict form, we'd propose the
23 language.

24 What damages, taking into account, any failure to
25 mitigate, and then going back to did the Trust. That would be

page 6352

page 6353

1 the only place to know whether they did it and conforming
2 change under C-2 the same affect, after the word damages, the
3 same.

4 THE COURT: C2.

5 MR. MANSFIELD: Yes, under C2 what damages, taking
6 into account the failure to mitigate, will the Trust suffer.

7 THE COURT: Okay.

8 MR. FINK: Respectfully, plaintiffs would strongly
9 object to this. Indeed we went over this yesterday and the
10 Court refused to give this very --

11 THE COURT: I'm going to give it now. I'm weakening.
12 I will put it in. It's an important point.

13 MR. MANSFIELD: We're almost there, your Honor.

14 THE COURT: I have just marked same here.

15 MR. FEIWUS: Your Honor, with respect to B five,
16 Liggett and Meyers Tobacco Company we'd like to conform to the
17 proper identified plaintiff in the case.

18 THE COURT: What do you want?

19 MR. FEIWUS: On page 52, B5, it is said of Liggett
20 and Meyers Tobacco Company, that should be Liggett Group,
21 Inc., which is --

22 THE COURT: Liggett Group, Inc.. Is there a comma
23 after group?

24 MR. FEIWUS: It is in the caption. We should conform
25 it.

page 6353

page 6354

1 MR. MANSFIELD: Page 54 first conforming change --

2 THE COURT: Let me get to it.

3 MR. MANSFIELD: We should add the phrase as set forth
4 in these instructions.

5 THE COURT: No. I'm not going to do that.

6 MR. MANSFIELD: We'd ask the Court to ask the
7 following question.

8 THE COURT: What do you want to do about.
9 MR. MANSFIELD: Yes, under C1 and C2.
10 Page 56 the same conforming change. Back to 54 we'd
11 propose the following question be the second question posed.
12 Had the defendants proved the elements of the
13 statutory affirmative defense under the New York statute, as
14 set forth in the instructions, yes, no. And then we just
15 could be form if yes go to three if no go to B.
16 THE COURT: Where does this go.
17 MR. MANSFIELD: This would be the second question
18 asked. Page on page 54 under A. First question is whether
19 the Trust has proved the elements.
20 The second question should be whether the defendants
21 have proved the elements of the statutory affirmative defense
22 under the New York statute as set forth in the instruction.
23 If we don't have that, than they could find all the elements,
24 but the defendants should still win.
25 MR. FINK: That is something that we went over
page 6354
page 6355
1 yesterday and we thought the Court appropriately concluded
2 this would be adding unnecessary surplusage to the verdict
3 form.
4 MR. MANSFIELD: It's really not.
5 MR. BICKS: There is expression on this as
6 affirmative defense. We just inserted the burden of proof as
7 to what the affirmative defenses.
8 MR. MANSFIELD: If necessary find all the elements,
9 once they get to it verdict form, but they have also found the
10 affirmative defense --
11 THE COURT: I will put it instead of a separate
12 question, New York statute, confirming affirmative defenses.
13 MR. MANSFIELD: Consider affirmative defenses, I
14 would ask to put the back as set forth in these instructions,
15 so that they can go back and look at it.
16 THE COURT: Okay.
17 MR. MANSFIELD: The last is on page 56,, we'd ask for
18 after the first question, A, we'd ask the Court to provide a
19 second question. And this goes to the statute of
20 limitations.
21 This is the Common Law Fraud claim. Have the
22 defendants proved that the Trust knew or threw reasonable
23 diligence had information to alert a reasonable person to the
24 possibility of bringing it's fraud and deceit claim prior to
25 December 31, 1991, and yes or no.
page 6355
page 6356
1 Again, it would be very confusing for the jury if the
2 jury so determines based upon the jury instruction, there is
3 no way for them to translate that to Roman Numeral III.
4 THE COURT: They'll do that in terms of the amounts.
5 MR. MANSFIELD: This would not necessarily go to the
6 amount, this could bar the claim altogether.
7 THE COURT: You mean treating this as affirmative
8 defense?
9 MR. MANSFIELD: Yes. If there is an affirmative
10 defense of statute of limitations that doesn't go to the
11 amendment, the jury determines --
12 THE COURT: I will do the same way as I did it in
13 two, considering affirmative defenses as set forth in the
14 instruction.
15 MR. MANSFIELD: Your Honor, just in the excess of
16 caution I wanted to make sure that the record reflects that we

17 do preserve our objection to the charge as we previously
18 indicated on the record.

19 THE COURT: Yes.

20 MR. MANSFIELD: And except to the charge to the
21 extent it's not as we propose it.

22 THE COURT: Yes. And the plaintiffs the same.

23 MR. FINK: Your Honor, on page 39, the fraud and
24 deceit statute of limitations, I missed this one. We need to
25 make a conforming change, the defendants assert the statute of
page 6356

page 6357

1 limitations as affirmative defense.

2 THE COURT: I put that in already.

3 MR. BICKS: I know we're tired but so the record is
4 clear, we have a specific instruction starting on page 48 that
5 is captioned failure to mitigate damages. Now we're rewriting
6 the verdict form which starts four pages later to insert the
7 failure to mitigate damages. I really don't think is fair or
8 even appropriate in light of the fact it's clearly in the
9 instruction.

10 I know your Honor indicated that we'll do that, the
11 whole purpose of having instructions before that is not to get
12 the verdict form bogged down.

13 THE COURT: You are right.

14 MR. BICKS: With respect to the other point, each of
15 the questions start out has the Trust proved an element for
16 the cause of action of common-law fraud. Now we've added in in
17 considering the affirmative defenses which the defendants have
18 the burden of proof.

19 THE COURT: I will tell them that. I understand.
20 It's not a perfect charge. It's not a pure charge. It has
21 all kinds of promises. Look it over, if you have something
22 else we get it in the morning.

23 Good night.

24 (Court adjourned to 8:30 a.m. January 17, 2001.)

25

page 6357

page 6358

1 Defendants move into evidence the following.

2

3 ARF-000477

4 ARF-000348

5 ARF-001912

6 ARF-001913

7 ARF-001901

8 ARF-000339

9 ARF-000342

10 ARF-000344

11 ARF-000346

12 ARF-000383

13 ARF-000514

14 ARF-000522

15 ARF-000558

16 DX-Martin 146

17

18

19

20

21

22

23

24

25

page 6358

page 6359

1 Defendant's documents to be admitted deleted from
2 Court Exhibit 80 on January 12, 2001

3

4 WS-003989

5 WS-001643

6 GL-000028

7 WS-000519

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

page 6359

page 6360

1 Mendelsohn Exhibits Used in Cross-examination

2

3

4 M-20A

5 M-20B

6 M-20C

7 M-20D

8 M-20E

9 M-20F

10 M-20G

11 M-20H

12 M-20J

13 M-20K

14 M-20L

15 M-20M

16 M-5

17

18 M-19A

19 M-19B

20 M-19C

21 M-19D

22

23

24

25

page 6360

page 6361

1 M-4

2 50167 p.239 (previously admitted.)

3 M-7

4 M-26 Roggli 1992 P.23

5 M-8

6

7

8 M-17 Asbestos and Influence of Cigarette Smoking
9 Selikoff's 1191 Data Chart and Underlying Documents

10
11 1948

12
13 M-18 Effects of Duration for Onset of Exposure and
14 Smoking

15
16 M-18A

17
18 M-22 Cigarette Smoking Increases The Risk of Asbestosis
19 Chart and Underlying Documents

20
21 M-22A
22 M-22B
23 M-22C
24 M-5

25
page 6361

page 6362

1 REBUTTAL DOCUMENTS

2
3 DOCUMENTS LETTER DATE
4 42822, 14224, 4088, 90870, January 10, 2001
5 24595, 33608, 76341.0151(a),
6 80,001(a) and 80,526

7
8
9 31311, 1536, 8706, 21639, 43166, January 11, 2001
10 43167, 13770, 44758, 44747, 18314,
11 17419, 19142, 17421-- Defendants'
12 Answers to Interrogatories 75035.040
13 75035/042, 75035/038 and 75035.041

14
15 R1 January 14, 2001
16 37349 January 14, 2001
17 80,002a January 14, 2001
18 80,002C January 15, 2001
19 76196.006 January 15, 2001
20 38472 January 16, 2001

21
22
23
24
25

page 6362

page 6363

1 Court Exhibit 69, Court 70, Court 72, Court 75 and Court
2 80..... 6146
3 76050.924, 76050.911, 76050.4671..... 6146
4 76050.911. Chesterfield. L&M 76050.924.
5 76050.4671. 6158
6 Court Exhibit 101..... 6161
7 Court Exhibit 102..... 6189
8 WZ001546A admitted..... 6189
9 GZ201246..... 6190
10 J E F F R E Y H A R R I S..... 6215
11 DIRECT EXAMINATION
12 BY MR. STENGEL:..... 6215
13 CROSS EXAMINATION
14 BY MR. BERNICK: 6251
15
16 W I L L I A M W E C K E R 6292

17 DIRECT EXAMINATION
18 BY MR. BERNICK..... 6292
19 DIRECT EXAMINATION
20 BY MR. BERNICK..... 6292
21 CROSS-EXAMINATION
22 BY MR. STENGL..... 6304
23 CROSS-EXAMINATION
24 BY MR. STENGL..... 6304
25 REDIRECT EXAMINATION

page 6363

page 6364

1 BY MR. BERNICK: 6316
2 Harris Exhibits 23 A, B, C..... 6284
3 Harris 1, 2, 3, 4 and 5. Defendant Harris 22, 23A, 23B,
4 and 23C..... 6292

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

page 6364